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P's Response to the Post-Trial Memo of the Twsp of Piscataway.

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX COUNTY

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,
Plaintiffs
v.
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al.»
Defendants

Docket No. C-4122-73

PLAINTIFFS[1] RESPONSE TO THE POST-TRIAL MEMORANDUM OF THE TOWNSHIP OF PISCATAWAY

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I. Introduction

The Township of Piscataway has filed with this Court a "Post Trial Memorandum" which purports to comment upon "An Analysis of the Freehold Township Mount Laurel Settlement Proposal: The Problem of Fair Share Credits" (hereinafter Freehold Report), authored by plaintiffs[1] expert witness in this case, Alan Mallach. This report was prepared and filed with the Court in the context of Mr. Mallach's appointment by the Court as its expert in American Planned Communities v. Township of Freehold -- a case in which Freehold submitted to the Court a proposal to settle without the extensive and protracted litigation which has transpired in the matter sjjt> jucHce between plaintiffs and The Township of Piscataway since 1974.

Despite the extensive history of this litigation and the deficiencies of the ordinances of the Township, defendants contend they are entitled to "credits", "modifications" and "adjustments" to reduce, and in fact abolish, their obligation to provide low and moderate income housing under Mount Laurel. These assertions are allegedly based on the Freehold Report.[1] This brief and Mr.

[1]While the Court granted the Township of Piscataway permission to respond to the Freehold Report, plaintiffs submit it is too late for Piscataway to attempt to reopen the record and make additional factual assertions by means of the vehicle of a post-trial memorandum. However, given the nature of the factual contentions made by Piscataway, plaintiffs have had no alternative but to file the Affidavit of Mr. Mallach and to affirmatively respond to the matters raised by defendants in this Memorandum.

Mallach's affidavit will show that defendants have not met their burden of establishing entitlement to such reductions. The deductions sought by defendants are not accurately premised on the Freehold Report, proper planning considerations, or the evidence in the record of this litigation.

For ease of consideration by the Court, this Memorandum will follow the order and format utilized by the Township of Piscataway and comment upon each issue raised seriatim,

II. Credits

(A) 2400 Garden Apartments and 1200 Single Family Residences

In the Freehold Report, Mr. Mallach specifies that a "unit which can count as a credit toward a community's fair share obligation is one which can legitimately substitute for a unit that would otherwise be provided through that community's Mount Laurel compliance program." (FR, p.2)(emphasis added). He stresses that a net increment in the housing stock must result. (FR, p.5). This net increment in the pool of sound housing available to the lower income population can result either by new construction, by rehabilitation of a substandard unit currently occupied by a lower income household, or at least in theory, through the filtering process, i.e., when a household moves from a substandard unit into

a sound unit rut previously available to lower income households. (FR, p.5).

Mr. Mallach concludes that the most obvious legitimate credit is for housing constructed or rehabi1itated within a community sjhice 1980, the date of the census data which is used to calculate fair share. (FR, p.8). Significantly, nowhere in its Memorandum does the Township of Piscataway contend that the 2400 garden apartments or the 1200 single family residences for which it seeks a "credit" were constructed or rehabilitated subsequent to the 1980 cut-off date. More importantly, there is no such evidence in the record. As Mr. Mallach's affidavit shows, no multifamily units have been constructed in Piscataway since 1970. (Aff. Para. 12(b), p.7).

With respect to housing constructed prior to 1980, Mr. Mallach determines that an award of credit must be grounded on the premise that filtering does contribute to meeting those housing needs. Only if filtering exists and is a significant factor, can one assume that a unit becoming available in a pre-1980 housing project is part of a process resulting in a net increment to the lower income housing stock (FR, pps. 9-10). It must be underscored that he specifically states in the Report that: "The sitnp1e\mexj s,tence £JLa pote ptially affordable un|tA therefore, is not of great

significance." *il£* at P- 1°) (emphasis *added).* It is, at best, only to the purported existence of such units that the Township of Piscataway's contentions relate. The standards which Mr. Mallach indicates must be demonstrated by the Township have not been met:

> (1) Becomes available during the fair share period;
>
> (2) Is occupied, when it becomes available, by a lower income household, who is spending no more than an appropriate share of its income to live in that unit; and
>
> (3) Exists within a market in which additional units affordable to lower income households are being simultaneously made available through informal increments to the housing stock after 1980
>
> (FR, p. 10).

The Township of Piscataway merely states in its Memorandum in a conclusory fashion: "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; ..." (DM, p.3). As Mr. Mallach indicates in his Affidavit, 1980 Census data does not support this unsubstantiated blanket statement nor does the record in this case. (Aff. Para.8, p. 4-5). Moreover, the

defendant does not allude to, let alone establish, any of the criteria (1), (2) and (3) set forth above. It is to be noted that Mr. Mallach expressed a serious question about allowing credits for pre-1980 private market affordable housing in the Freehold Report. (FR, p. 10.}.... He found such a credit to be an "inherently unstable" solution to lower income housing needs even if the criteria were established (which in this case have not been established) in the absence of means to ensure continued lower income affordability or occupancy. Mr. Mallach, in his Affidavit (Para. 8, p. 4-5) clearly indicates that the existence of a rent levelling ordinance in Piscataway does not provide the requisite assurances. Accordingly, since the defendant has not satisfied any of the bases outlined in the F£ej2fu)l^dJRe_£Ort, credit for the garden apartments should be disallowed by the Court. It is to be noted that no credits for such units were recommended by Mr. Mallach in Freehold.

The same situation is true for the 1,200 single family units which defendants claim as a credit. Again, only an assertion is made that: "Approximately 1,200 single family residences in the Township are affordable by low income households[11] (DM, p.3), without any evidence provided whether these units are pre- or post-1980 units. Even more significantly, if post-1980 units, there has been no evidence to show whether these units are (a) available for

^purchase at the present; (b) would be affordable, if available, or (c) would be purchased by lower income households assuming such affordability. This provides another instance where the data supplied in Mr. Mallach's affidavit (Aff. Para. 9, p. 5) leads to the opposite conclusion. As a result, the 1,200 single family residences also provide no basis for a credit against the fair share of Piscataway.

B. Group Quarters

The f.ieehoXd Re££rt provides no justification for defendants to allege that credit should be accorded for dormitories, single student apartments and family housing units of Rutgers University (DM, p.3). In point of fact, the Report argues against the application of credits for such a purpose:

> "Although they are a part of the population, there are good reasons for excluding the institutional population from the fair share calculation, as was done in the Warren methodology. They are, for the most part, dependent for a substantial part of their survival, not only their shelter, on others, and in most cases some form of public entity. Furthermore, their accommodations are not provided (as a general rule) through a marketplace process, but through the intervention of public or private nonprofit entities. Particularly to the extent that they are public facilities, it is likely that the provision of such institutional facilities as indicated above has not been significantly affected by municipal exclusionary zoning or other land use practices, which is the issue at the core of the Mount Laure2 decision, which in turn is the starting point of this entire discussion. (Footnote omitted). The fundamental inconsistency between the

> notion of credits in this area and the essence of the fair share obligation becomes apparent if one bears in mind the underlying principle behind the granting of credits; namely, whether the unit in question can readily be substituted for a unit in the community's M£MILi_k[au]!l£l compliance package." (FR, p. 11).

The record of the trial of this matter provides the data in support of plaintiffs' position that such group quarters do not constitute housing for purposes of fair share methodology or the census of housing.

However, the record does rurt reflect an admission by Mr. Mallach or the plaintiffs that "plaintiffs did accede to a credit to Piscataway's fair share number, representing the 348 family units ..." as asserted by defendants. Mr. Mallach, who testified as to this issue states:

> [W]hile acknowledging that these units mi£ht be considered fair share credits, plaintiffs noted that no evidence was submitted as to the extent to which these units were indeed occupied by lower income households, so that no basis was offered to determine how many, if any, of the 348 units should indeed be considered fair share credits. (Aff., Para. 7, p. 3-4).

In the absence of such evidence in the record, no factual basis exists for the Court to conclude the 348 units are to be credited against the fair share of Piscataway.

c- 20% Vacant Land Factor

While defendants place their contention regarding the 20% factor under the subheading of "credits", they seek to have the

Court totally disregard application of this factor on the grounds that since Piscataway has insufficient vacant developable land its application is "inappropriate."[11] (DM, p.3). The 20% vacant land factor was established by this Court in AMG as a part of the methodology and thus serves as an integral element in its implementation. Such a wholesale elimination of a crucial part of the established methodology should not be accomplished absent objective evidence in the record which directly provides a basis as to support a deviation of this nature. Again, a dearth of evidence exists in the record to specifically support the necessity of a modification of this magnitude to the formula, and defendants cite none in their Memorandum. (See Mr. Mallach's Affidavit, Para. 4 through 6, p. 2-3).

III. Modifications^

The defendants argue that the Court should apply the modification of the methodology adopted by Judge Skillrnan in the Countryside Properties, et al.v« Mayor and Council of the Borough of Ringwood, et aK decision. That modification consists of altering the method of determining the present and indigenous need more accurately to reflect in a different way the percentage of substandard housing that is actually occupied by lower income households (FR, p.21). Contrary to the defendants[1] assertions, Mr. Mallach in his report regarding Freehold Township, did not "clearly

suggest that this modification be adopted by the Court" (DM, p.4). Mr. Mallach stressed in his attached affidavit that the modification should not be adopted without first making a full evaluation and comparison of the alternative methodologies. (See Affidavit, para. 10, p.5.) Even if the Court agrees with the defendants[1] contention that the 82% assumption *[82%* of substandard housing is occupied by lower income households) is invalid, the Court would be ill-advised to adopt an alternative percentage figure without first conducting a full evaluation and comparison of the methodologies. Also, the Court should require the defendants to show both why the *BZ%* figure is invalid as applied to it and what the percentage figure should be. It should be noted that the defendants failed to raise this issue at either the trial or the vacant land hearing. The defendants should not be permitted to raise an issue after the trial has run its course. Moreover, even if this "modification" were to be utilized, Piscataway still is a long way from meeting its fair share.

IV- Adjustmentsto Fair Share Other Than Credits

First, it should be noted that the adjustment section of the Freehold Report, upon which the defendants rely, was prepared by Mr. Mallach pursuant to a proposed settlement of the litigation in that matter. The only adjustments recommended in the Report concern adjustments awarded in consideration of Freehold Township's

food faith efforts to bring about a settlement and achieve voluntary compliance in the face of Mount Laurel litigation. That was the context in which Mr. Mallach's report was written and it would be misleading to contend that the character of the instant matter approximates the context within which the Freejiol d Rep or^t was produced.

As the Freehold Report indicates, there are potentially two areas of adjustment that exist: The first concerns an adjustment for the past non-exclusionary performance of a community. The second potential trigger of an adjustment is cooperative and non-obstructionist behavior on the part of a community in the form of efforts to achieve a negotiated settlement of the litigation and compliance with the constitutional mandate of MP-Mi-k^MIil• Both of these serve the salutary public policy of encouraging voluntary compliance with the requirements of Mount Laurel.

A- Adjustment For Past Performance

1 • The Past Performance of Piscataway

"The municipal obligation to provide a realistic opportunity for low and moderate income housing is not satisfied by a good faith attempt. The housing opportunity provided must, in fact, be the substantial equivalent of the fair share." Southern Burlington £oMi£_M£C^^ et al. v. Township of Mount Laurel, 92 N.J. 158» 219 (1983) [hereinafter "Mount Laurel II"]. "Good or bad faith ...

[is] irrelevant." *M.* In order to make that determination, a court should look objectively at whether or not a "municipality has in fact provided a realistic opportunity for construction of low and moderate income housing." Where the court does not find evidence of such an opportunity, the municipality has failed to satisfy its Mount Laurel obligation. Id. at 221.

A municipality attempting to prove its satisfaction of a fair share obligation, or attempting to justify its failure has the burden of proof by a preponderance of the evidence. A "definite presentation of facts" must be made on the part of a defendant-municipality." Id. at 223. Defendant Piscataway has not met this burden.

Chief Justice Wilentz's introduction to Mount Laurel II explicitly states the thrust of the decision: "to provide a realistic opportunity for housing, not litigation.[11] Id. at 200. The experiences of the plaintiff in its dealings with Piscataway have been precisely the opposite of the goal referred to by the Chief Justice. Not only has the Township of Piscataway been a defendant in this case for eleven years, but it has continued to generate litigation, rather than work towards compliance with the precepts of Mount Laurel.

Urban League v. Cartillf-i was brought eleven years ago by the National Committee Against Discrimination in Housing, challenging

the zoning ordinanees of 23 of the 25 munictpalies in Middlesex County. During the first trial, a majority of the cases were settled, or it was determined that a fair share obligation did not exist. Id. at 343-46. Piscataway Township was one of the 23 municipalities included in that initial litigation. Eleven years later, the opportunity for affordable housing remains unmet in Piscataway.

Piscataway has continued to argue that their fair share has been satisfied, and to contend that their zoning ordinances were sufficient. These arguments were rejected as far back as Judge Furman's decision in 1976.

The trial court concluded that an unmet need for Tower income housing existed in Middlesex County; and that the exclusionary practices of the defendant municipalities was largely responsible for that unmet need. *td.* at 343.

In particular, Piscataway's exclusionary ordinances included:

1. severe restrictions on mobile homes;
2. restrictions on multi-family housing;
3. restrictions not necessary for health and safety, or required by good planning practices;
4. the limitation of apartments, efficiencies and one-bedroom units. Id. at 344.

Judge Furman found that the zoning practices of Piscataway

were in violation of Mp_u_nt_Laure/[, and ordered that the Township take affirmative steps to encourage the construction of lower income housing. Such steps could be accomplished by utilizing mandatory set-asides and density bonuses, and pursuing federal and state housing subsidies. *l&.*

Piseataway, along with six other municipalities, appealed Judge Furman's decision. The Appellate Division reversed the trial court's Order, finding that the "region" utilized by the trial court was erroneous. 170 N.J. Super. 461 (1979). Mount Laurel II reversed the Appellate Division's decision remanding to the trial court for further proceedings regarding regional definition, regional need, establishment of fair share number, and revision of various ordinances. MauntJ-aurel|X» 92 N.J. at 349.

Plaintiffs have sought and been granted restraints against the Township, preventing it from using up its developable land. Restraining Orders were issued against the Township of Piscataway on May 7, 1984, June 26, 1984, November 5, 1984, and December 11, 1984. Each request for restraints was instituted to prevent Piscataway from violating its constitutional obligation to provide realistic opportunities for the construction of low and moderate income housing. Each was brought against the Township because of its insistence on granting approvals for development despite the constraints imposed by its lack of vacant land. The plaintiffs

have continuously been In a position of potentially suffering irreparable injury and it has only been through the issuance of restraints by this Court that the status quo has been maintained. It is to be noted that Piscataway's interlocutory appeal with respect to the restraints was refused by the Appellate Division and the Supreme Court.

Defendants[1] Memorandum reflects a fair share number of 3,744 units of low and moderate income housing for Piscataway by applying the AMG methodology (AMG Realty Company, et at. v. Township of Warren, Docket Nos. L-23277-8 PW and L-67820-80 PW (July 16, 1984). The AMG methodology was held to apply to the Urban League case in the Court's Letter Opinion of July 27, 1984.

There has been an extraordinary growth rate in Piscataway in the past decade in both employment and rateables. Between 1972 and 1982, 16,761 jobs were added to employment stock, while during the period of 1970 to 1980, only 2,234 housing units were added. *td.* During this period large amounts of land have been developed, and substantial land has become unsuitable for residential development as a result of its proximity to adjacent non-residential development. (Mallach Affidavit, 5/1/84, para. 5).

Despite its assertions that it is unable.to meet its fair share obligation, Piscataway has provided opportunities for commercial and office development, exacerbating the need for

iffordable nousfng, yet providing none. The Township's growth policy reflects the cavalier attitude of the township's governing body and its planning board toward its Mount Laure1 obiigations.

Moreover, Piscataway has not made sincere attempts to revise its zoning ordinances to guarantee realistic housing opportunities for low and moderate income households.

The only attempts by the Township to amend its zoning ordinances were made in 1978 when it established a planned residential development zone (Ordinance No. 78-27) and enacted another ordinance to regulate the new land use -- a Planned Residential Development Ordinance (Ordinance No. 78-28). Neither satisfies the requirements of Mount Laurel II.

In order to provide a "realistic opportunity" for the development of low and moderate income housing, municipal ordinances must include a mandatory set-aside. *Id.* at 267. (See A. Mallach, "Expert Report on Moun.t^Laure1 11 Issues,[11] prepared 12/83 - Sections A & B, [hereinafter "Expert Report[11]].)

A density bonus has been available in Piscataway since 1978, but it is inadequate. Its application depends upon a fluctuating, and often scarce supply of Federal and State housing subsidies. Id. at 263. The density bonuses are available if low or moderate income housing plans are included in planned residential zones. It does not provide an assurance that the Township will be able to

meet its obligation to fulfill those housing needs. JN. at 217.

A number of other major flaws still exist in the Piscataway Township ordinances, IJlt£r £1iji:

1. They fail to provide resale or rental price controls to ensure that housing continues to be affordable to low and moderate income households.

2. There are no phasing-in requirements for low and moderate income units to balance developments.

3. There are no provisions for flexibility regarding residential mix, non-residential and open space requirements, and plan modifications.

4. The maximum gross density of eight units per acre is inconsistent with maximum gross densities for townhouses, garden apartments or other types of multifamily residential development. ("Expert Report", s_u£rja, paras. A & B, p. B2 & B3).

Another significant issue is the modest number of acres presently zoned for planned residential development. Piscataway's Fair Share Housing Study» prepared in May of 1983 by the Piscataway Township Division of Planning and Development, identified only 164 acres for PRD. Plaintiff's expert, Alan Mallach, in his December 1983 Expert Report on M^unt Laure\ ±I Issues in Urban League of Greater New Brunswick v. Borough of Carteret, et al., calculated

that only 492 units of low and moderate income housing could result from so few acres. ("Expert Report", p. B3). This number is only a fraction of Piscataway's fair share obligation.

The municipal ordinances in Piscataway also contain provisions that go beyond the Township's need to protect health and safety, and are also excessively cost-generating. Illustrative are the requirements that PRDs contain a minimum of 30 contiguous acres (New Jersey Municipal Land Use Law requires only a 5-acre minimum. N.J.S.A. .40:'55D-6); buffers and screens be installed along the entire perimeter of land tracts; an Environmental Impact Assessment be prepared for each tract regardless of whether areas are classified as environmentally sensitive; preparation of an Educational Impact Statement which is an unnecessary expense of dubious value, and should be deleted, etc. (See ££nera21y_, "Expert Report," supra, para. C, p. B3 to B.5.)

Piscataway's zoning ordinances also prohibit the development of mobile home parks, a measure which may be necessary for the Township to satisfy its MpunV.Laurel obligation. See 92 N.J. at 275.

2. Piscataway's Claim for an Adjustment Based on Past Performance

The defendants purport to base their argument for such an adjustment on Mr. Mailach's treatment of the subject in his

Freehold Report. Upon careful scrutiny, however, one is able to detect a rather blatant manipulation of the analysis by the defendants. First, the defendants note that Mr. Mallach's Report cites three different factors that should be considered in determining whether an adjustment should be granted at all, and if so, to what degree. The factors as contained in the Mallach Report are as follows:

> (1) The extent to which the past performance has created units within the community which can be shown to be available at present to lower income households, or will become available during the fair share period under consideration.
>
> (2) The extent to which the past performance was a conscious or deliberate response by the community to the constitutional mandate set forth in Mount Laurel in 1975 and in Oakwood at Madison, Inc. v. Twp. of Madison, 72 N.J. 481 (1977). (Footnote omitted).
>
> (3) The extent to which the past performance for which an adjustment was sought was indeed extraordinary. (FR,

From the plain language of the Report, it seems logical that each of the above factors was intended to be applied to the particular element of past performance offered by

municipality as grounds for awarding an adjustment in its fair share obligation. The defendants chose not to follow this logical approach, however. Instead, Piscataway's past performance is discussed somewhat haphazardly; the defendants neglect to apply each factor to the particular element of past performance. In contrast, we will evaluate each of the elements of past performance suggested by the defendants as warranting adjustments.

First, the defendants note the existence within Piscataway of 2,400 garden apartment units, 1,200 existing single family units and 348 student family housing units. (D.M., p.6) It should be noted that there has been some disagreement as to the current affordability level of these units (especially the single family units), not to mention their prospective affordability considering the possibility of conversion and the relative dearth of effective rent control and income qualification provisions. (See Affidavit, paras. 7 through 9, p. 3-5.) The student family housing cited by the defendants should not be considered within the Mount Laurel context because it is institutional in nature. (See discussion, supra p. 7-8.)

But, these considerations aside, before an adjustment can be awarded as recognition for these elements of past performance, the elements should be evaluated in light of the other two factors of

the three noted by Mr. Mallach. The second factor has to do with the extent to which the past performance under consideration was a conscious or deliberate action taken by the municipality in recognition of its constitutional obligation as construed in Mount kiEIil^l (1975) and Oal<wood at Madison (1977). All of the garden apartment units cited by the defendants were constructed well before the Mount Laurel j <jecision. The single family units referred to by the defendants were not the result of any deliberate response to Mou£t L£ureJ[I^. The student housing cited by defendants is not even relevant under this factor because its creation was the result of actions taken by an Independent entity, Rutgers University, and not those of Piscataway Township. And Piscataway tried to keep it out. See, Rutgers v. Piluso, 60 N.J. 142 (1972).

The third factor is the extraordinariness of the performance. Even if these units had been the result of Piscataway's response to its Mount Laurel obligation, which they clearly were not, it would be a rather strained argument to claim that this kind of response was somehow extraordinary. With regard to the garden apartments, as Mr. Mallach noted, "many, even most, suburban municipalities have approved at least sjome multifamily housing-.*" (FR, p. 15) (emphasis in original).

The defendants also note the fact that Piscataway has a median

income multiplier of 1.02 (i.e., median income of Piscataway is 1021 of the regional median). It is not reasonable to assume that Mr. Mallach meant to imply in his Report that because a municipality is near the regional median income level the municipality can be deemed to have gone out of its way to provide lower income housing. The median income level of a community is a result, for the most part, of historical patterns that developed well before the Mount Laurel era. (See Affidavit, para. 11, p. 6.) A town that possesses a median income level substantially below the regional median might be able to argue that that has some facial significance with regard to its commitment to providing affordable housing. However, given that Piscataway's median income level is not substantially below, but is, rather, above the regional median, the defendants are in any case not in a position to make such an argument, (id.)

The defendants make a number of assertions regarding zoning and rezoning undertaken in Piscataway.[2] Unfortunately, and

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[2] "Piscataway has voluntarily rezoned substantial acreage to accommodate hundreds of anticipated Mount Laurel units." (DM, p. 6).

"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 township." (DM, p. 7).

"[I]n 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

inexplicably, the defendants fail in each case to specify the particular zoning ordinance or ordinances to which they refer. The only initiative taken by Piscataway in the way of zoning to meet its Mount Laurel, obligation that could arguably be of any significance has been the amendment of its ordinances to establish "Planned Residential Development Zones" (PRDs).

Ordinance number 78-28 was enacted in 1978 to establish the PRD zones. As pointed out in Mr. Mallach's "Expert Report" of December 1983, (see, previous discussion, supra, p. 16-17), these ordinances are fraught with inadequacies: They do not include a mandatory set-aside; they do not provide for resale or rental price controls to ensure that units continue to be affordable; they do not require the construction of low and moderate income units with the balance of the development; they do not provide sufficient flexibility in terms of residential mix, non-residential and open space requirements and plan modifications. ("Expert Report", p. B2). Mr. Mallach noted that even if the entire PRD zone

> were available for high density residential development and, assuming a 20% mandatory set-aside and an average gross density of 15 units per acre, this amount of land could accommodate only 492 units of low and moderate income housing. ("Expert Report", p. B3).

This Would fall far short of Piscataway's fair share obligation.

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acreage was rezoned to permit housing at a density of 10 units to

The defendants* by their vague references, may have also intended to offer their "RM" (multifamily residential) zoning for consideration. Mr. Mallach has noted that:

> The Township's present and proposed RM ... zones appear to be largely developed and designed to reflect existing garden apartments. In that event they would not be relevant to the satisfaction of the Township's fair share obligation. If the Township includes the RM zone as part of its fair share remedy, the provisions governing this district which contain a number of cost-generating features would have to be deleted or modified. ("Expert Report", p. B1, n.1).

It would appear that most of the units in the RM zone were built prior to 1980. The RM zone ordinances make no provision at all for lower and moderate income housing.

Neither of these zoning ordinances fare very well when measured by the three factor test recommended in Mr. Mallach's Freehold Report. First, neither can be said to have created to any significant degree units within the community that can be shown to be available at present or in the immediate future to lower income households. As noted above, even under the most generous extrapolation, the PRD zoning with its voluntary density bonus could be counted on for only a marginal total. The RM zone, as noted also, for the most part represents the already existing garden apartment stock and thus, without more, are not relevant for

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the acre." (DM, p. 7).

ti*e satisfaction of Piscataway's "fair share obi igation.

Second, while the defendants might reasonably argue that this zoning was in some way a deliberate response to its Mount Laurel obligation, one could not credibly argue that these were sincere initiatives intended to fulfill the municipality's obligation to provide a realistic opportunity for the construction of low and moderate income housing. An objective assessment of this zoning would compel the conclusion that this was, to be sure, a "deliberate response by the community"; however, it was a response not to carry out its constitutional duty, but to create a mere illusion of compliance.

Third, since neither of the zoning actions taken can be said to have moved Piscataway in any significant way from the sjtatus^ pjjo —- these ordinances cannot be said to represent extraordinary initiatives on the part of the municipality.

The defendants contend that in direct response to Mount Laurel jTI they commissioned "a fair housing analysis," which resulted in the rezoning of one additional site for high density residential development. This action, as the defendants acknowledge, '(DM* p. 7), was not taken 1n response to Mount Laurel I or Oakwgod at MatHsjHi, but rather, in response to Mount Laurel II. Thus, under the second factor in the analysis it would not merit consideration for an adjustment. Significantly, the Report to which the

defendants apparently refer is that prepared *by* the defendants' expert, Lester Nebenzahl, in the context of this very litigation, and thus cannot be looked upon as being the kind of unilateral and selfless action that the defendants attempt to imply.

Finally, the defendants draw attention to the fact that the percentage of rental housing within Piscataway is substantial. (DM, pp. 7-8) As Mr. Mallach points out in his Affidavit, this level is not extraordinary for the region; four of the other nine similarly situated townships in Middlesex County are comparable to or greater than Piscataway in'term's of their percentage of rental housing. (See Affidavit, para. 12, p. 7-8.) Again, as has been noted, (supra, p. 21), most of Piscataway's rental housing was created well before the Mount Laurel decision --and, therefore, was not a response to the Mount Laurel 2 mandate. Also, as noted previously, there are serious questions regarding the affordability of this housing in Piscataway. (See Affidavit, para. 8, p. 3-4.)

B. Adjustments for Voluntary Settlement

As Mr. Mallach noted in his Report, "[t]here are strong public policy arguments in support of offering incentives for settlement." (FR, p. 16). Mr. Mallach'lays, out three different points at which voluntary compliance can be deemed to have begun:

(1) A settlement which is negotiated only after an an extended period of pretrial preparation, or even after

the beginning of trial (the distinction is not considered of great substantive weight);

(2) A settlement where negotiations begin expeditiously after a suit has been filed, before any substantial pretrial activity has taken place, and where a settlement is also reached expeditiously; and

(3) A community has enacted a program of voluntary compliance with Momrt ^Ljums!, without any lawsuit having been filed, and seeks court approval in order to have a formal determination of its fair share obligation, and to obtain the six-year period of repose offered in Mount Laurer II* '(FRi p. 17)

The defendants[1] conduct in this matter cannot be said to correspond to any of these threshold levels of compliance. As Mr. Mallach has indicated in his affidavit the defendants have "rebuffed *e\rery* effort to settle this litigation." (Affidavit, spara. 13, p. 8). It bears repeating that the Freehold Report, from which the defendants attempt to wring their arguments* was produced in the context of a settlement. Like Freehold, six of the eight remaining original defendants to this litigation have reached at least partial settlement with the Urban League plaintiffs without the need for continued adversary proceedings. Those settlements involved a variety of arrangements negotiated between themselves

and plaintiffs so as to reasonably resolve the municipalities[1] 1£iiJlJ:_LiiMI^e-l obligations. Piscataway made no such efforts; on the contrary, they have fought the imposition of a fair share for the better part of a decade. The defendants should not benefit from their recalcitrancy.

The defendants argue that in 1976 "the court concluded that Piscataway had fully met its obligation to house indigenous low income households." (DM, p. 8) The defendants go on to imply that this decision relieved Piscataway of any further obligation and, therefore, the defendants cannot have been expected to have sought settlement of an obligation that was non existent.

The fact of the matter is that Judge Furman did not decide onjj£ that Piscataway had no unmet indigenous need; he also ruled that Piscataway had to shoulder a portion of the regional need projected to 1985. Judge Furman determined in 1976 that Piscataway's share of that regional need was 1,333 units. Urban League of Greater New Brunswick v.Borough of Carteret, 142 N.J. Super. 11, 37 (Ch. Div. 1976). As was emphasized by the Supreme Court, Piscataway was required by the trial court to "do more than just refrain from zoning out their fair share allocation of lower income housing. Affirmative steps to encourage the construction of lower income housing, such as utilizing mandatory set-asides and density bonuses, and pursuing federal and state housing subsidies,

were required." Mourrt Laurel 11, supra at 347 (emphasis supplied).

So, in effect, the defendants are arguing that Piscataway should receive an adjustment in consideration of the settlement that they would have sought to bring about had they not found the fair share calculated nearly nine years ago by Judge Furman to be so disagreeable/This is one of the more brazen examples of tortured logic that appears throughout the defendants' Memorandum.

V. Conclusion

Piscataway is not entitled under any circumstances to adjustments in its fair share, because it is not proposing, and never has proposed, settlement of this case on any plausible basis. Similarly, in theory, Piscataway might be entitled to some credits against its fair share, but it has not made the case for such credits on the record now before the Court.

However, should the Court deem Piscataway entitled to any credits or adjustments, the fair share base against which such credits may be taken is most important. The recent vacant land hearing concerned itself with only one component of Piscataway's fair share, that which permits new construction of potentially affordable units. However, as Piscataway concedes, its full fair share under the AM3 formula is 3744 units. (DM, p. 1).

Vacant land alone is an insufficient measure of the limit of Piscataway's fair share for two reasons.

First, some of the vacant land might be developed at ratios higher than the 4:1 ratio of Mount Laurel to market housing that is commonly used. Mobile home developments, such as provided for in the East Brunswick, North Brunswick, and South Brunswick settlements, require substantially higher Mount laurel set asides because the economics of these developments permit doing so. Moreover, even in the absence of federal and state subsidy programs, 100% lower income developments are possible if maximum advantage is taken of lower cost public bond issues, tax sheltering, development fee ordinances and similar innovative financing techniques. Thus, until the remedial process is completed, it cannot be assumed that any given quantity of available land will permit a HlMiniMOl fair share based only on a 20% (4:1) set-aside.

Second, Mo^nt L.a^rel compliance can frequently be achieved, at least in part, through techniques that do not require any building, or any vacant land, at all. Existing substandard building can be rehabilitated, for instance, large structures can be converted to two or three family residences, and unaffordable apartments can be made affordable by imposition of rent and occupancy controls or by subsidies. Again, no judgment can be made about the maximum fair share that is possible until these opportunities have been explored during the remedial process, assisted by the Master.

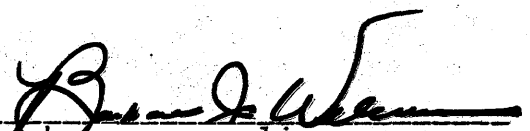
If the fair sh^re obligation of Piscataway Township were to fee determined based solely on vacant land at a 201 set aside, and if credits for existing housing or adjustments were then to be allowed against a fair share thus determined, Piscataway would be allowed to do less than it could. So long as the fair share derived from vacant land is less than the fair share derived from the AMG methodology, any credits for existing housing should not be allowed to reduce the obligation to use vacant land for Mount Laurel purposes until it is shown that the total AMG fair share cannot be achieved by the Township's overall compliance plan. In effect, given the discrepancy between Piscataway's true fair share and its relatively small inventory of vacant land, any credits for existing affordable housing should be set off only against the component of the AMG fair share that cannot be achieved through use of vacant land. To do otherwise would be to unfairly reward Piscataway for its past exclusionary behavior, by which it used up the land available for affordable housing and placed itself in a position where it was able to do less than other communities. Precisely because of Piscataway[1]s unconstitutional land use practices, particular care must be taken to insure that it comes as close to satisfying its full fair share as possible.

We recognize, as a practical matter, that a realistic fair share compliance program for Piscataway will have to rely heavily

on the vacant land inventory* and we understand the Courtis effort to determine a realistic obligation based on that land. We Respectfully suggest, however, that the Court's judgment and order should also find and determine the full fair share applicable under the AMG methodology, and should require the defendant Township and the Master to explore means of meeting a larger portion of the full fair share, either by more intensive use of the vacant land available, or by solutions that do not require use of additional land at all. We most urgently request that the Court not allow unearned credits for existing housing to be taken against a partial fair share in a way that would reduce that partial solution towards de minimis, when more could be done.

Dated: April 17, 1985

Respectfully submitted,



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