ML Piscataway ~~Freehold~~ 17-Apr.-85

Affidavit of Alan Mallach, development consultant and court's Expert re: D's post-trial memo

Submitted in response to Alan Mallach's previous "Freehold Report."

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SUPERIOR COURT OF NEW JERSEY
MIDDLESEX COUNTY/OCEAN COUNTY

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

Civil Action

AFFIDAVIT OF ALAN MALLACH

MONMOUTH COUNTY :
: - SSS8
NEW JERSEY :

ALAN MALLACH, of full age, being duly sworn according to law, deposes and says:

1. I am a housing and development consultant retained by the Urban League plaintiffs to consult on issues related to the above-mentioned litigation, including determination of fair share goals and compliance with those goals. In that context, I have dealt extensively with the issue of fair share "credits"; i.e., existing housing units in a municipality which can be applied to offset that municipality's fair share obligation.

2- I have, furthermore, been appointed as the court's expert in the matter of ~~American Planned Communities v. Township of Freehold,~~ which is a ~~Mount Laurel~~ case. In that capacity, I was submitted a report to the court in January 1985 making

recommendations with regard to the extent of fair share credits which could be applied against Freehold Township's fair share obligation, and, inter alia, discussing in detail the theoretical as well as practical considerations governing this question. In view of the comprehensive nature of that discussion, I will not provide a similar background discussion in this affidavit, but will refer to the Freehold report where background information appears to be relevant to a specific point made in the affidavit.

3. In my capacity as consultant to the Urban League plaintiffs, I have reviewed the post-trial memorandum submitted by counsel for the Township of Piscataway dated March 6, 1985, dealing with the subject of fair share credits, and purporting to rely in large part on positions taken and arguments made in the Freehold report. This memorandum claims (at 1) to "analyze Mr. Mallach's report, and apply his conclusions to Piscataway". On the contrary, as I will explain in detail below, the Memorandum utterly misrepresents the positions and arguments of the Freehold report, and either misunderstands, or distorts, both the clear language and the logic of the fair share housing allocation process. In the balance of this affidavit, I will comment on the specific contents and assertions of the memorandum, following the sequence in which those assertions appear in that document.

4. The memorandum argues (A, at 2> that "as Piscataway has insufficient vacant developable land to meet its fair share, the application of the 2®H increment is inappropriate in its case". This is not correct. The 28# adjustment is an integral element in the fair share methodology, and represents a "real" housing need as

much as any of the other need categories in the formula. The argument in the memorandum appears to be grounded in the premise that the £054, unlike indigenous need categories, present *n&&d* categories, or prospective need categories, is extraneous to the "true[11] fair share, and thus can be lightly discarded.

5. Furthermore, while there is no dispute that, to the extent it can be demonstrated that Piscataway cannot accomodate its fair share (a number which includes the 23* adjustment), its fair share obligation should be reduced, there has been no definitive finding to this point as to the extent to which Piscataway can or cannot meet the fair share obligation generated by the consensus methodology. Thus, there is as of yet no established factual basis for any such adjustment, on any grounds.

6. Finally, with regard to this issue, should it be determined that Piscataway's fair share should be reduced, that reduction should be on the basis of objective evidence; in other words, a lower income housing goal should be established for the township by working upward on the basis of suitable sites and other realistic means of providing lower income units, not by eliminating a category of need from the fair share allocation. Thus, in the final analysis, this particular adjustment is not only inappropriate, but clearly academic.

7. As the memorandum notes (B, at 2), plaintiffs objected to any credit for dormitory housing at Rutgers University, largely on grounds that these were group quarters, and not housing in the meaning of either the Census of Housing or the fair share methodology. The argument made later in the memorandum (at 12) that the large number of such group quarters in Pisetaway should justify

a credit (while smaller numbers might not) is without merit, since the reasons for not crediting these accomodations go to the basic nature of the facilities provided. The memorandum errs in stating that plaintiffs agreed to a "credit" for *all* 348 graduate student family units; while acknowledging that these units might be considered fair share credits, plaintiffs noted that no evidence was submitted regarding 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.

8. No objective basis was ever provided to prove the assertion <C, at 3) that "not less than 2,400 Cgarden apartments} *are* currently affordable by moderate income households. These affordable units are substantially occupied by lower income households". On the contrary, there is objective evidence, including data from the 198© Census, which shows!

a. Of the so-called "affordable" garden apartments, roughly S/3 are only affordable to households at the very ceiling of the moderate income range, and thus are of dubious value to the overwhelming majority of the lower income population;

b. Substantially less than half of the occupants of rental housing in Piscataway, based on 1980 Census data, were 1ower income household1ds;

c. Of those lower income households occupying these units, the overwhelming majority were spending over 30# of their income for rent, thus establishing that these units were not "affordable" by a reasonable definition.

Applying the analysis used in the Freehold report, one concludes that at most 10 percent of the garden apartments in Piscataway are both affordable to, and occupied by, lower income households. Furthermore, the face that a rent levelling ordinance exists in

Piscataway Cat 13) is of only limited relevance; the history of rent control in New Jersey municipalities makes clear that such ordinances come and go, and that rental housing, in any event, may be converted to condominium or cooperative ownership at any time. In the absence of market conditions likely to ensure continued lower income affordability (which, conditions, almost without doubt, do not exist in Piscataway), there is no sound basis for any credits being provided for these units.

9. The argument that credit should be provided for 1,208 single family houses "affordable by low income households[11] is completely without merit; no evidence was provided that any of these units are (a) available for purchase at the present; (b). would be affordable, if they were on the market; or (c) would be purchased by lower income households, even if affordable. Indeed, common sense, as well as such data as is available, dictate precisely the opposite. Data from the New Jersey Division of Taxation for calendar year 1983 showed that a total of 8 single family units were sold that year in Piscataway at prices under $40,000, the upper limit of even theoretical lower income affordability. Since there were far more non-lower income households who could potentially afford those units than lower income households, it is unlikely that more than a handful of that small number were indeed purchased by lower income households. No evidence, however, to support an argument that <u>any</u> of these units were made available to lower income households was ever offered by the defendants.

10. The memorandum argues for an adjustment in present need based on the modification made by Judge Skillman in the <u>Rinawood</u>

decision, and states that "Mr- Mallach's report clearly suggests that this modification should be adopted by the Court" (at 4). This is a blatant misrepresentation of an explicit position taken in the Freehold report; while I acknowledge that the modification made by Judge Skillman is grounded in a rational basis, and is thus worthy of consideration by this court, I explicitly state (Freehold, at ¶¶ and at 35) that no such adjustment should be made until or unless a full evaluation and comparison of the alternative methodologies has been made. I believe an objective reading of my report would make clear that the modification proposed by Piscataway is totally inconsistent with the position advocated therein.

11. The memorandum argues that the fact that the median income in Piscataway is 102% of the regional median "in and of itself... .confirms Piscataway's ante-Mount Laurel commitment to the creation of a variety of housing types (at 5).." This is not so, in any true sense, and is clearly unsupported by any explicit statement in the Freehold report, or any inference drawn from the report. While the unusually high median income of Freehold Township tended to suggest that that municipality was not extraordinary in its commitment to affordable housing, nothing about Piscataway suggests the contrary. fis discussed in the Freehold report (at 13-14), the median income level of a community is largely determined by historical patterns not only predating the Mount Laurel decision, but zoning itself. The use of median income ratios in this part of the memorandum is wholly inconsistent with the logic of the Freehold analysis.

12. Although perhaps not explicitly set forth, I believe that the thrust of the Freehold analysis is that adjustments for prior performance are clearly more appropriate in the context of settlement than where the matter is being adjudicated after extended and uncompromising litigation. Furthermore, if» as Piscataway claims, the township is physically unable to accomodate more than a modest part of their fair share obligation, the entire matter is likely to be academic. With regard to the substance of the township*s claim (at 6-8), some points should be made:

a. While the percentage of rental housing in Piscataway is substantial, it is not unusually so; as shown in the table on the following page, the percentage of rental housing in four of the other nine townships in Middlesex County is comparable to or greater than that of Piscataway/1.

b. Notwithstanding the percentage of rental units, the fact remains that all of these units were constructed not only prior to the Mount Laurel decision, but prior to 197®| from 1973 to the present, no new rental housing has been constructed in the Township/2-

c. The ordinance adopted subsequent to Mount Laurel I, was limited to offering a voluntary density bonus for production of lower income housing, which density bonus was substantially less generous than other ordinances enacted by other communities during the same period (see Iwe1usionarv Housino Programs, at 114-115. No lower income housing was built as a result of this ordinance, *&n* outcome that any objective analyst could easily have anticipated.

In conclusion, the evidence in support of adjustments for prior

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I/I have chosen to compare the percentage of rental housing in Piscataway with that of the other townships in Middlesex County, rather than with the other municipalities in Middlesex County so that the comparison would not be biased by the inclusion of the many older communities with large percentages of rental housing such as New Brunswick (68%), Highland Park (59#), Perth flmboy (56%), and the like.

£/Indeed, no multifamily housing at all has been built, with the exception of one development approved as a result of court order.

RENTAL HOUSING AS ft PERCENTAGE OF OCCUPIED HOUSING STOCK IN MIDDLESEX COUNTY TOWNSHIPS

PLAINSBORO	84%
NORTH BRUNSWICK	42
OLD BRIDGE	36
PISCATAWAY	34
EDISON	33
WOODBRIDGE	23
CRANBURY	23
SOUTH BRUNSWICK	17
EAST BRUNSWICK	15
MONROE	7

performance, applying the criteria set forth in the Freehold report, while not entirely nonexistent, is highly equivocal, as is the evidence in support of the township's argument that it sought in good faith to comply with Mount Laurel I and Mount Laurel II.

.13. The township further argues that, notwithstanding its having rebuffed every effort to settle this litigation, it is entitled to an adjustment to its fair share analysis for precisely what it has refused to entertain (at 8-3). This is clearly inappropriate, and not worthy of detailed comment. It should be noted, however, that the township's claim that "a settlement 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 aeeomodate municipalities with no land limitations... (at 9)" is in error; having participated in many of the meetings at which the subject was discussed, I can state on the basis of my own knowledge that all of plaintiffs* settlement proposals were grounded in the premise that Piscataway's fair share number for settlement purposes, in recog-

nit ion of limited land availability, would be substantially less than the the fair share number derived through the consensus methodology. Indeed, the manner in which the memorandum goes to great lengths to shift the onus for the absence of settlement to the plaintiffs <at 14-15) is irresponsible, and wildly at variance with the record in this matter. Whatever Piscataway's reasons for having rebuffed plaintiffs* settlement efforts may be, the arguments given in the memorandum, including the one cited above, do not hold water.

14. Furthermore, records filed with the court demonstrate that the Urban League has reached full or partial settlement of this litigation with six of the nine municipal defendants, including East Brunswick, North Brunswick, Old Bridge (with regard to fair share), Plainsboro, South Brunswick, and South Plainfield. The other two cases in which no settlement has been reached, it should be noted, are complicated by the presence of large numbers of builder plaintiffs and intervenors- In all of these settlements, the Urban League has consistently shown flexibility and responsiveness, in the interest of meshing the achievement of realistic lower income housing goals with the planning concerns of each municipality.

15. In conclusion, the memorandum adds little or nothing to arguments that the township has already made, in support of fair share credits or adjustments to their fair share obligation. Instead, the memorandum raises a host of irrelevant points, and irresponsibly misuses this author's Freehold report in a blatantly self-serving manner. In the final analysis, the only real issue

that must be confronted in resolving Piscataway's lower income housing obligation is that of the realistic physical capacity of the Township to accomodate such housing. Efforts such as this memorandum seek to redirect attention from that determination into unproductive and irrelevant blind alleys.

Alan Mallach

Sworn to before me this
4th day of April, 1985

Attorney at Law
State of New Jersey