certification of Phillip Lewis Paley,
atty for Δ/Piscataway
- in support of Piscataway's application
to transfer suit to COAH and for other
affirmative relief

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: MIDDLESEX COUNTY
DOCKET NO. 4172-73

URBAN LEAGUE OF GREATER NEW BRUNSWICK, ET AL., Plaintiffs,	Civil Action
vs.	CERTIFICATION
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, ET AL., Defendants.	

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

1. I am an attorney-at-law of the State of New Jersey, a member of the firm of Kirsten, Friedman & Cherin, a professional corporation, attorneys for the defendant Township of Piscataway in the within matter; I also serve as Director of Law and Township Attorney for Piscataway. I

have served as trial counsel for Piscataway in this matter at all times subsequent to the remand of this litigation ordered by the Supreme Court of New Jersey in South Burlington NAACP et al. v. Township of Mt. Laurel, 92 N.J. 158 (1983) (herein "Mt. Laurel II").

2. I respectfully submit this Certification in support of Piscataway's application to transfer this suit to the Affordable Housing Council, established by legislation generally known as the Fair Housing Act of July, 1985, and for other affirmative relief as reflected in the Notice of Motion filed simultaneously herewith. The Notice of Motion contains no specific return date in accordance with discussions had between the law secretary to the Honorable Eugene D. Serpentelli and the undersigned; the Court, as I understand it, is to set a return date so that similar applications brought by other municipalities can be decided simultaneously.

3. The starting point for the analysis of the appropriateness of the relief sought is Mt. Laurel II. That decision effectively reaffirmed the thesis that municipal land use regulations must provide a realistic opportunity for low and moderate income housing as a matter of constitutional imperative.

4. Quite clearly, though, that reaffirmation (with the implementing procedures adopted by the Supreme Court) was based upon profound dissatisfaction with, among other social institutions, the Legislature of the State of New Jersey. The Supreme Court sought to encourage the Legislature to act, thereby guaranteeing the continuing viability of the Mt. Laurel doctrine:

> "... a brief reminder of the judicial role in this sensitive area is appropriate, since powerful reasons suggest, and we agree, that the matter is better left to the Legislature. We act first and foremost because the Constitution of our State requires protection of the interests involved and because the Legislature has not protected them. We recognize the social and economic controversy (and its political consequences) that has resulted in relatively little legislative action in this field. We understand the enormous difficulty of achieving a political consensus that might lead to significant legislation and forcing the constitutional mandate better than we can, legislation that might completely remove this Coiurtfrom those controversies. But enforcement of constitutional rights cannot await a supporting political consensus. So, while we have always preferred legislative to judicial action in this field, we shall continue -- until the Legislature acts -- to do our best to uphold the constitutional obligation that underlies the Mt. Laurel doctrine." 92 N.J. at 213.

5. In a footnote immediately following the above quotation, the Supreme Court added the following language:

> Although the complexity and political sensitivity of the issue now before us make it especially appropriate for legislative resolution, we have no choice, absent that resolution, but to exercise our traditional constitutional duty to end an abuse of the zoning power." Footnote 7, 92 N.J. at 213.

Continuing its analysis of the respective roles of the Legislature and the courts in affirming the Mt. Laurel doctrine, the Supreme Court stated, further:

> "We note that there has been some legislative initiative in this field. We look forward to more. ... Our deference to ... legislative and executive initiatives can be regarded as a clear signal of our readiness to defer further to more substantial actions.
>
> ... in the absence of adequate legislative and executive help, we must give meaning to constitutional doctrine in the cases before us through our own devices, even if they are relatively less suitable." 92 N.J. 213, 214.

6. Further, in its conclusion to the Mt. Laurel II opinion, the Supreme Court crystallized its views:

> "As we said at the outset, while we have always preferred legislative to judicial action in this field, we shall continue -- until the Legislature acts -- to do our best to uphold the constitutional obligations that underlies the Mt. Laurel doctrine. That is our duty. We may not build houses, but we do enforce the Constitution." 92 N.J. at 352.

7. Following months of exhaustive deliberation,

the State Legislature presented to the Governor of the State of New Jersey a bill entitled "The Fair Housing Act" in June, 1985. Clearly, the Fair Housing Act was a specific response to both Mt. Laurel I and Mt. Laurel II. Among other findings issued by the State Legislature is the following:

> "In the second Mt. Laurel ruling, the Supreme Court stated that the determination of the methods for satisfying this constitutional obligation' is better left to the Legislature,' that the court has' always preferred legislative to judicial action in their field, 'and that the judicial role in upholding the Mt. Laurel doctrine' could be decrease as a result of legislative and executive action.' §2b.

The legislation establishes in the Department of Community Affairs of the State of New Jersey a Council on Affordable Housing. Functions assigned to that council include the necessity to determine state-wide housing region and estimates of present and prospective need for low and moderate income housing on state and regional levels. Additionally, the Council is directed to adopt criteria and guides for determining the municipal fair share, both present and prospective, and to adjust the determination and of fair share based upon a variety of factors, including available vacant and developable land, infra-structure, environmental or historic preservation factors, the poten-

tial for a drastic alteration of the established pattern of development in the community, among others. Section 7(c). The Affordable Housing Council is also authorized to limit the fair share, based on a percentage of existing housing stock in a municipality and any other criteria including employment opportunities which the Council deems appropriate.

8. In order to reach conclusions as to the ultimate fair share obligations to be assigned to each municipality, the Affordable Housing Council requires that each municipality appearing before it submit a "housing element", which includes an inventory of the municipality's housing stock, a projection of anticipated construction, an analysis of the municipality's demographic characteristics and employment characteristics, and a review of the land inventory of each municipality. Specific time limits are imposed for each stage of the process leading up to the determination of the municipality's fair share.

9. The emuneration of these factors suggests rather clearly the motivation behind the Court's preference for legislative action - the scope of the problem does not lend itself to adversarial litigation.

10. As to prospective lawsuits, litigation seeking to enforce the Mt. Laurel mandate which is filed after May, 1985 (strictly, within 60 days prior to the effective date

of the Fair Housing Act - Section 16B) must proceed before the Affordable Housing Council. As to existing litigation, the Act provides:

> "For those exclusionary zoning cases instituted more than 60 days before the effective date of this Act, any party to the litigation may file a motion with the Court to seek a transfer of the case to the Council. In determining whether or not to transfer, the Court shall consider whether or not the transfer would result in a manifest in justice to any party to the litigation." Section 16.

11. This application is respectfully submitted pursuant to that authority. It is the position of the Township of Piscataway that, at the present level of the litigation before the Court, the failure to transfer would result in a manifest injustice to the Township of Piscataway, and the transfer would result in no injustice to either plaintiff in this litigation.

12. Following the remand of this matter from the Supreme Court of New Jersey, this Court (as it well recalls) set up a series of formal and informal pretrial conferences to narrow the contested issues and to develop an appropriate formulation of methodology for the determination of "fair share". In this particular case, Piscataway was one of seven defendants on the remand. The trial of this matter, specifically addressing the determination of the fair share methodology as to all municipalities, and in-

cluding some testimony as to Piscataway's efforts to show compliance with the Mt. Laurel doctrine by virtue of existing municipal legislation, took place during the month of May, 1984. As to Piscataway, that portion of the trial produced a conclusion supported by the Urban League, the Township of Piscataway and the Court that Piscataway lacked sufficient vacant developable land to comply with the "fair share" derived by a methodology adopted by this Court in AMG, et als. v. Township of Warren (the "consensus methodology"). Consequently, this Court appointed Carla Lerman to conduct an inventory of the vacant land extant in the Township and to make written recommendations as to the potential and suitability of each site for high density residential housing and recommended densities. Ms. Lerman's report was submitted in November, 1984; thereafter, the Court extended leave to all parties to present testimony supporting or refuting Ms. Lerman's conclusions. This testimony was presented in February and March, 1985.

12. Thereafter, the Court considered Piscataway's application for an inspection of the vacant sites recommended for high density development by Ms. Lerman; the Court, in the presence of counsel for the Urban League and Piscataway Township, did conduct such an inspection. On July 23, 1985, the Court rendered an opinion which assigned to Piscataway a "fair share" of 2,215, substantial-

ly less than the 4,192 which the strict application of the consensus methodology would have required, but also a number which, using traditional "four for one" zoning, would consume the entirety of the remainder of Piscataway's suitable vacant land and leave no land available for development at less than 10 residential units to the acre.

14. As of the dictation of this Certification, no order resulting from the Court's opinion has yet been executed. No master has yet been appointed to assist the Township in meeting the obligations imposed upon it by the court's opinion. In short, we have only just commenced that portion of the litigation following the determination of the fair share number. Thus, a transfer to the Affordable Housing Council will undo no work and will not render academic any extensive and directed effort either on the part of the Court or on the part of any party to effect compliance with the Court's determination.*

15. In order to gauge the merits of this application, the Court should examine those steps taken by Piscataway in order to accommodate the Mt. Laurel doctrine. This Court well knows that four vacant sites (Sites 7, 38,

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* While it is clear that many individuals (including the Court and its able law clerks) have labored long and hard in this matter, the vast bulk of the effort was directed toward a determination of the methodology to be used which, as the opinion entered reflects, was not directly employed to produce the fair share number.

46 and 57) were previously voluntarily zoned by the Township to accommodate high density dwelling units, with a density bonus for a Mt. Laurel component. One of those sites, site 46, is in the process of being fully developed with 545 housing units, of which 109 will be classified as Mt. Laurel. While there may be conceptual differences between the parties regarding whether this rezoning is sufficient, the rezoning of this acreage on a voluntary basis hardly suggests an attitude equivalent to "standing in the schoolhouse door". Moreover, Piscataway is one of the few municipalities in the State of New Jersey to have construction commence on a site zoned specifically for occupancy by Mt. Laurel housing (site 46).

15. Furthermore, Piscataway is a community which features a broad variety of housing within its borders. As the Court will recall from the testimony, approximately 30% of all housing units within the Township are multi-family, those consisting primarily of several extensive garden apartment developments. More than 1000 housing units within the Township are assessed at values which, upon the application of the County Tax Equalization Ratio, are valued at market at amounts which do meet Mt. Laurel guidelines. More than 10% of the land area of the Township is owned and utilized by Rutgers, The State University, as the largest campus of the state university system; included

within that acreage are dormitories, single student housing, and family housing. This variety of housing is substantially affordable by lower income households, demonstrated by the statistic that, as compared to the median household income for Piscataway's region, the median household income for Piscataway is 102%. The extensive mixture of housing types and the low median income proportion reflected above suggests that, even though (perhaps) not meeting certain statistical criteria, Piscataway has endeavored, in good faith, to place zoning in effect for a wide variety of housing occupants throughout the years. While it may be statistically correct to suggest that Piscataway has been "exclusionary", that is the only parameter of accuracy for the application of the word to Piscataway.

15. I have previously submitted to this Court a lenghty analysis of a report provided by Allan Mallach, expert for the Urban League (now Civic League) in this matter, which applied the consensus methodology to Freehold Township, and concluded by extending substantial "adjustments" to Freehold Township for one reason or another. My analysis demonstrated that, if the identical review were applied to Piscataway, it is quite possible that the number of units required of Piscataway would be substantially less than that ordered by the July 23, 1985, opinion. For example, I suggested that it is fatuous to use a 20% factor

applicable to communities with ample vacant lands to augment Piscataway's fair share, when Piscataway clearly has insufficient vacant developable land. I also suggested that substantial reduction should be effected by considering Piscataway's variety of housing and relatively low median income proportion. The conclusion reached was that the substantial variety of housing stock now affordable and occupied by lower income households should permit Piscataway to receive an adjustment at least equal to that extended to Freehold Township pursuant to Mr. Mallach's report.* Freehold Township, as the Court will recall, has a median income proportion of 135% of the median household income of its region and has a far smaller proportion of multi-family dwellings than does Piscataway.

16. I also pointed out that certain applications of the consensus methodology had been reviewed by this Court and other Mt. Laurel courts and had been found to require some modification from the initial report, in the interests of fundamental fairness. For example, a revision was adopted by Judge Skillman regarding the computation of indigenous need; application of that revision to Piscataway would have reduced Piscataway's number by more than 100 units from the initial formula.

17. Of course, the analysis adopted by this

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* The Urban League disagreed.

Court in Piscataway was unique, because, presumably, Piscataway is the only municipality contesting the application of the consensus methodology which had insufficient vacant developable land. Because of the Court's analysis, no party is in a position to determine whether the reductions to the consensus methodology fair share number mooted in my earlier letter (and disputed, it must be said, by the Urban League) would have been adopted. The point is that it is eminently possible, and indeed probable, that a fair share analysis applied to Piscataway under the same parameters used in Freehold Township, Ringwood, Paramus, Parsippany, and other municipalities would have produced a lower number.

18. Clearly, this Court understood that the number ascribed to Piscataway was high; to my best knowledge, (and it affords no pride in the undersigned to admit this), the number assigned to Piscataway is the highest number assigned to any municipality in the State. While someone must always be at the bottom of the barrel or at the top of the heap, (the Court may pick whichever metaphor it deems more appropriate), the number assigned to Piscataway, in absolute terms, must be compared to the numbers produced by the consensus methodology in other municipalities, a comparison which the undersigned has endeavored to point out to this Court on numerous occasions in prior communications. Take, for example, Saddle River, a wealthy community in Bergen County, consisting of nothing but single family residences zoned on large lots. The

number produced by the consensus methodology applied to Saddle River is 75; at a four for one rezoning, therefore, Saddle River must zone to permit the construction of 375 additional housing units. Saddle River made the determination decades ago that it would permit no development within its municipality but for homes accommodating the wealthy. Similarly, communities such as Mendham Township, a traditionally wealthy enclave of large individual residences, is obliged to house approximately 35 lower income households. Compare these results with the results in a town like Piscataway, which has 43,000 people; 12,300 housing units; approximately 3,500 garden apartments; extensive light industrial development creating a valuable resource for the entire State; and zoning which, by the stipulation of all parties in this case, accurately reflects the proper and appropriate land use for the Township in each area (by which it is meant that there has been no overzoning for commercial and industrial usage, and that the lot sizes for residential dwellings are generally smally by pre-Mt. Laurel standards. In terms of "injustice", it is unjust and inequitable to say to Piscataway that because Piscataway followed the law as it existed and sought to create a diverse community of every economic, racial, social and religious group, it should now be compelled to comply with standards from which the wealthiest communities in the State are exempted, because they chose, in the past, to isolate themselves from households of lower income.

19. The above analysis demonstrates cogently that the requirement imposed by this Court upon Piscataway is unfair and inequitable. Arguably, a fair proportion of the inequity reflected in the Court's determination is a function of the Court's failure to have considered aspects of past performance applicable to Piscataway and aspects of the existing character of the community. The Fair Housing Act specifically requires that these factors be considered by the Affordable Housing Council in effecting a determination of a community's fair share. By analyzing the municipal obligation to make the Mt. Laurel mandate viable in these terms, the Affordable Housing Council will ensure that the "fair" share is fair, not only from the point of view of public interest groups such as the Urban League but also from the point of view of the municipality involved.

20. It also should be noted that the opinion of the Court rendered in Piscataway's case gives to Piscataway substantial discretion in meeting the fair share number which the Court has directed. The Court has said rather explicitly that it does not expect each parcel of vacant land to be zoned for high density development, the implication being that Piscataway is expected to produce innovative approaches towards meeting the number of 2,215. The Court can well understand that the development of a program along the lines suggested by the Court will take

some time and a great deal of effort. Piscataway respectfully submits that this time be far better spent before an administrative agency authorized to consider the variety of factors referred to in the legislation which remain outside the "consensus methodology".

21. In addition, it should be pointed out explicitly that any lawsuits filed after May, 1985, must be brought before the Affordable Housing Council. For this Court to retain jurisdiction in Piscataway's case may well mean that two separate governmental entities will continue to make rulings applying to municipalities of this State. If nothing else, the extensive litigation in Mt. Laurel has demonstrated that the implemention of the Mt. Laurel mandate is certainly confusing, even within the parameters of a limited number of judges making decisions and only one judge dealing with each municipality. It is clear, however, that the Affordable Housing Council will be empowered to develop and determine areas which consitute regions throughout the State, which might well vary from those regions determined by this Court as part of the consensus methodology. It is hardly fair to place any municipality in the position of having to respond simultaneously to two different forum, both endeavoring, in good faith, to produce the same result.

22. For the foregoing reasons, the Township of Piscataway respectfully moves before this Court for an Order

transferring this matter to the Affordable Housing Council. The Court's failure to grant the motion will place into effect the following irony: Piscataway, having voluntarily sought to provide housing of substantial variety before Mt. Laurel I, does not obtain credit for its early action, because of the pre 1980 rule; similarly, Piscataway, having resisted what it felt to be an onerous obligation, and having its position vindicated by this Court, to some extent, cannot take advantage of the standards embodied within the legislation because the legislation was enacted too late, given the trial dates held in this matter. Certainly, realizing that no master has yet been appointed in Piscataway's case and that the post-judgment phase of the litigation has not yet commenced, the appropriate remedy is the requested transfer.

23. Piscataway also requests dissolution of a restraint contained within an Order entered by this Court on December 11, 1984. Without delineating the full background of the events leading up to that Order, it is clear that that Order was a response to the realization that Piscataway had insufficient vacant land to accommodate the consensus methodology number, and it was also clear that that restraint was imposed as a temporary measure, to prevent the necessity for the Urban League to supervise the

agendas of the Municipal Zoning and Planning Boards. Now that the Court has determined the number, there is no further reason for that restraint. Presumably, the Affordable Housing Council, or whatever forum continues with this matter, will have the authority to supervise Piscataway's land use and to insure that Piscataway deals with a Mt. Laurel obligation in good faith. The Court's opinion, as earlier alluded to, entails substantial flexibility: yet, so long as the restraint remains in effect, the flexibility is non-existent. If Piscataway is to be compelled to meet its number, using a flexible approach, then Piscataway should have the option of taking, say, a particular site which the Court found suitable for high density residential development, and devoting it to some other use. In light of this circumstance, Piscataway respectfully moves for the vacation of the Order dated December 11, 1984.

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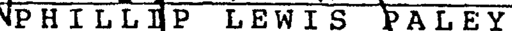
By: 
PHILLIP LEWIS PALEY

Dated: August 30, 1985