Reply Brief: Piscataway: re—
urging the court to find the Fair Housing
Act constitutional and reverse order
denying Piscataways' application to
transfer to the Affordable Housing Council

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SUPREME COURT OF NEW JERSEY
DOCKET NO. A-131- (Piscataway #24,787)

URBAN LEAGUE OF GREATER NEW BRUNSWICK, ET AL.,

Plaintiff,

vs.

THE MAYOR AND COUNCIL OF CARTERET, ET AL.,

Defendants.

Civil Action

TOWNSHIP OF PISCATAWAY'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

This Reply Brief will address certain factual assertions and legal conclusions contained within the consolidated brief of the Urban League respondents addressing Cranbury, Monroe, South Plainfield and Piscataway.

Piscataway has earlier pointed out its unique status in this litigation. Its population density (and absolute population, as well) is substantially greater than any other Mt. Laurel defendant now appealing. Furthermore, Piscataway has taken major steps during the past 9 years to provide for substantial housing affordable by lower income persons. Since 1977 alone, Piscataway has rezoned tracts of 88 acres, 30 acres, 40 acres, and 55 acres respectively for high density residential development with a density bonus for lower income housing, plus a 9.5 acre tract for senior citizen housing. Each of these tracts was deemed "suitable" for such development at trial.

In addition, between 1960 and 1970, Piscataway permitted hundreds of acres to be rezoned for apartment development at densities between 12 to 15 to the acre. The resultant apartments comprise nearly one-third of Piscataway's housing stock, some 3,600 dwelling units, of which more than 2,200 fall within Mount Laurel rental guidelines. The 1980 census clearly reflects a much lower median income for Piscataway's tenants than for

Piscataway's homeowners;* therefore, the bulk of existing garden apartment units are affordable by, and occupied by, lower income households.

A. "COMPLIANCE FACTS".

With respect to that section of the Urban League brief entitled "Compliance Facts as to Piscataway" (page 6 of that brief), Piscataway responds as follows:

(A) The limited developable land in Piscataway is not solely a function of development subsequent to Judge Furman's judgment following (plaintiff's brief, p. 7). From the 1960's Piscataway, bisected by Route 287 and connected by important transportation routes to Newark and New York City, has proved attractive to both residential and commercial developers. Plaintiffs imply that Piscataway should have predicted with certainty this Court's decision in Mount Laurel II, which took nearly 3 years for this Court to decide and which blazed new trails in the implementation of the Mount Laurel constitutional prerogative. Clearly, based upon its extensive zoning for high density residential development, Piscataway did acknowledge an obligation to provide housing affordable to lower income persons.

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* $18,000 for tenants; $30,000 for homeowners.

Is Piscataway to be prejudiced because it endeavored to comply with what it viewed as its ultimate obligation? Is Piscataway's addressing of the needs of lower income households for affordable housing to be totally ignored, as the Urban League maintains?

B. The Urban League commences its brief with the words "[a]fter 11 years of litigation..." True, the Urban League filed its complaint in 1974. However, since then, positions espoused by Piscataway and other communities were affirmed fully by the Appellate Division (see 170 N.J. Super. at 461). Furthermore, this Court expressed substantial disagreement with the trial court's concept of "region" and its allocative process, as did Piscataway and other defendants. Therefore, to imply that the length of the litigation somehow entitles a party to special equities, particularly a party whose arguments did not predominate for much of the time, is fatuous.

Plaintiff harshly criticizes Piscataway for aggressively defending its position on remand. Piscataway's defense, however, persuaded the trial court that the application of the consensus methodology, designed substantially

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* Judge Furman expressly found that Piscataway had fully met its obligation to provide for a fair share of low and moderate income housing. The number ultimately attributable to Piscataway at trial, 1,333, resulted from a process of allocation which this Court found artificial.

to apply to communities with ample vacant land, should be modified to address communities lacking vacant land. Piscataway's fair share was reduced by more than 40%, principally because of this argument. Is Piscataway to be penalized because it is proven right?

Piscataway also contended at trial that its past successful efforts to provide a variety of housing should be considered in addressing its future obligation. The Act contains two provisions specifically addressing past efforts, the "credit" provision [§7(c)(1)] and the direction to the Council to consider the impact of any new development upon existing land use patterns [§7(e)]. These two issues are of signal importance to a fair adjudication of Piscataway's obligations [and rights]. The inclusion of these standards in the Act suggests that the Legislature intended to address the complex issues presented by those substantially developed municipalities caught in the Mount Laurel maelstrom.

C. Plaintiff argues that the Township contested "each and every site" recommended by the Court's expert in a supplementary during February, 1985. Piscataway contended that the examination of each individual site in a vaccuum, without considering the residual traffic and infrastructure impact upon the entire Township, was inappropriate. The Court, unfortunately, defined a site as "suit-

able" only if it felt that residential development on that site was potentially feasible. The Court did not address the aggregate impact of the development of all "suitable" sites; it overlooked developmental limitations because of inadequate infrastructure, supporting roads, drainage, and other legitimate planning concerns regarding the aggregate effect of high density development of the Township as a whole.*

D. Plaintiff's contention that it was "forced" to seek temporary restraints against Piscataway is misleading. The largest parcel (30 acres)** involved was subsequently determined by the court to be suitable for light industrial uses, as asserted by Piscataway from the outset. On December 11, 1984, the Urban League obtained a blanket restraint against non-Mount Laurel development of "suitable lands***; Piscataway has scrupulously honored this restraint.

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* The Court did permit additional hearings addressing further reductions in Piscataway's fair share based upon additional evidence which might be presented addressing these issues.

** The other two parcels alluded to by the plaintiff in the last paragraph on page 7 of its brief consist of 25 acres and 4 acres, respectively. No Mount Laurel development application has been filed as to either parcel.

*** Over Piscataway's objection that the landowners should be made parties prior to the imposition of restraints - how ironic that plaintiff now argues its case based, in part, on a "vested rights" theory!

B. MANIFEST INJUSTICE

In addition to Piscataway's earlier arguments regarding the appropriate standard to be employed in determining manifest injustice [Piscataway's brief, 11-14; see Gibbons v. Gibbons, 86 N.J. 515, 523-524 (1981)], Piscataway reemphasizes that any delay implicit in the Act should not be considered, in and of itself, to constitute manifest injustice. This Court has recognized, on numerous occasions, that when the Legislature institutes an administrative process as a substitute for judicial action, substantial delays may often result before the administrative process is operational, Cf. Abbott v. Burke, 100 N.J. 269 (1985), Robinson v. Cahill, 64 N.J. 449 (1976), but that any such delay does not consitute a deprivation of a constitutional right.

The trial court concluded that Piscataway has approximately 1100 vacant acres of land suitable for residential housing.* Nearly 300 of these acres have already been zoned for high density housing affordable by lower income persons. The lands thus rezoned reflect the consi-

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* Piscataway disagrees with this conclusion, which, in its view, dishonors this Court's clear commitment to the preservation of existing agricultural uses and open space and is inconsistent with §7(c)(2)(c) of the Fair Housing Act.

dered view of Piscataway's governing body, elected by Piscataway's citizens to represent their interests, as to appropriate development within the Township. Is it not relevant that only one landowner (owning 55 acres) disagrees with this view sufficiently to sue for rezoning?* Might this not reflect the recognition by land owners that, despite their obvious inclination toward profit, substantial rezoning of Piscataway's lands is not in their best interests?

These rezoning issues are not addressed by the Urban League's brief, which emphasizes an approach designed to produce the highest numbers possible. Indeed, after the principal author of the consensus methodology testified as to its merit at trial, not one party in any Urban League case presented any testimony that the numbers hould be higher.

"Manifest injustice" applies to a municipality, i.e. "any party", as much as to any plaintiff. Piscataway has addressed in its initial brief the materially adverse planning consequences of the rezoning of its remaining vacant land. What is peculiarly unjust, however, is that, the high density development mandated by the trial courts

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* The owners of six other small tracts of land (all smaller than 25 acres, one as small as 3 acres) have indicated a willingness to develop their properties at high density.

does not appear to address those persons for whose benefit the methodology was engendered. It is common knowledge that many of the persons who have obtained Mount Laurel housing in Bedminster, for example, are young, upwardly mobile professionals, rather than individuals formerly occupying substandard housing units in urban centers. Therefore, the adoption of the consensus methodology has not satisfactorily addressed the problem for which the methodology was designed. The application of the consensus methodology has produced manifest injustice to all persons involved in the process, save the landowners; arguably the avoidance of this injustice was the compulsion for the adoption of the Act.

Not the least of the ironies of Mount Laurel litigation is that municipalities, consisting of the public [in Piscataway's case numbering nearly 43,000], are somehow deemed to be adverse to the public interest, while builder-developers, interested primarily in profit, are deemed to more adequately represent the public interest. In effect, the (presumably 2,215) lower income beneficiaries of Judge Serpentelli's opinion and the owners of the land planned for housing for those beneficiaries have greater impact on Piscataway's land uses than the decisions of officials elected to office by 43,000 people! Is this, ultimately, the mandate of Mount Laurel?

I.

THE "CONTINUING JUDICIAL ROLE" WITH RESPECT TO PISCATAWAY

Piscataway's status at trial is not such that "all substantive matters have been adjudicated and compliance is well advanced" (Urban League's Brief, page 18). The only substantive determination reached at trial is the establishment of a presumptive fair share number. Judge Serpentelli's opinion, however, clearly affords to Piscataway an opportunity to persuade the trial court that the number is unachievable and inappropriate. In addition, the Court intends to hold hearings addressing Piscataway's compliance with the presumed fair share number (2,215) or such lesser number as may ultimately be determined. The Court's own estimate of the time to be expended in this process is 6 months.

Furthermore, the presumptive fair share number was not established until 21 days following the effective date of the Fair Housing Act. Therefore, at the time that the Fair Housing Act was adopted, no substantive matter had been adjudicated, and compliance, as to Piscataway, had not even commenced. Piscataway, therefore, does not fall within that class of cases for which plaintiff contends a denial of transfer is mandated.

Plaintiff further argues that the Legislature did not intend the Act to apply retroactively as to substantive determinations already reached (Urban League's Brief, page 37). Yet, it is clear that the Council will employ a materially different analysis than that reflected in the consensus methodology. Arguably, the consideration of the existing development posture of each municipality (as well as the credit provisions) represents some accommodation to those communities (such as Piscataway) which are substantially developed, which have limited vacant developable land, and which have made good faith efforts to attract a diverse population. The Legislature's intent that developed municipalities be addressed in a realistic manner would be directly flouted by a decision preventing transfer to the Council.

II.

THE "CREDITS" PROVISION IS CONSTITUTIONAL AND IS INTENDED TO ACCOMMODATE THOSE MUNICIPALITIES WHICH HAVE VOLUNTARILY PROVIDED REZONING FOR MT. LAUREL QUALIFIED HOUSEHOLDS.

Section 7(c)(1) of the Act provides as a credit "each current unit of low and moderate income housing of adequate standard". Piscataway respectfully contends that this Court should construe Section 7(c)(1) so as to preserve its constitutionality, by applying that clause

to affordable housing units occupied now and in the future by lower income persons. The much more stringent reading of Section 7(c)(1) reflected in the Urban League's brief (at pages 84-85) fails to acknowledge the past efforts of municipalities to meet their Mount Laurel obligations.

The Urban League maintains that the disqualification of all housing units constructed prior to 1980 is fair. Piscataway persists in its view that such disqualification is manifestly unjust.

III.

OTHER EQUITABLE CONSIDERATIONS.

Judge Serpentelli rendered his opinion on July 23, 1985, ordering Piscataway to develop a compliance plan by October 23, 1985. Piscataway had objected to the commencement of the 90-day compliance period (running from the date of Judge Serpentelli's opinion) upon receipt of that opinion for several salient reasons, including the lack of a full time planner and the summer vacation schedules then in effect. Nonetheless, Piscataway did commence work on a compliance plan; the Township Attorney met with the Mayor and the Municipal Planner (after his appointment) on several occasions in order to develop the seeds of such a plan, in compliance with Judge Serpentelli's order.*

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* Actions hardly denotive of "dingy" hands.

August and September were consumed by Piscataway's attention to the transfer provisions of the Act and its preparation of moving papers supporting its application for transfer. To some extent, the attention given this matter by this Court demonstrates that the time devoted to these issues was eminently justified.

Plaintiff has suffered no prejudice by Piscataway's actions. On December 11, 1984, Judge Serpentelli entered an Order restraining all non-Mount Laurel development on 37 sites throughout the Township. Piscataway has done nothing which could even be remotely considered a breach or dishonor of that restraint.* No approvals have been rendered by any municipal agency or board which would vitiate the continuing viability of that restraint.

Until July 23, 1985, Piscataway's efforts were directed at a vindication of its position before the trial court. Piscataway has acted wholly equitably in this entire process. It has not postured; it has not acted insincerely. Piscataway fervently believes that the implementation of the Mount Laurel doctrine by the consensus methodology contravenes the public interest, and it has said so from the

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* Had it acted otherwise, its actions would surely have been addressed by the Urban League in its brief.

beginning. Piscataway views the Act as a direct response to the abuses implicit within the consensus methodology formula. It contends that the implementation of the consensus methodology violates the constitutional mandate for the separation of powers. It has acted honorably and professionally in asserting that position; it should certainly not be estopped on that basis from a favorable ruling on its transfer application.

CONCLUSION

For the foregoing reasons, Piscataway respectfully urges this Honorable Court to find the Fair Housing Act constitutional and to reverse Judge Serpentelli's Order of October 11, 1985, denying Piscataway's application to transfer this litigation to the Affordable Housing Council.

Respectfully submitted,

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By: _____
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Dated: December 11, 1985