memorandum of Law in opposition to motion for imposition of conditions on transfer of litigation to CCAH submitted on behalf of Δ, Twp of Piscataway

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JUDGE SERPENTELLI'S CHAMBERS

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION: 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.	Civil Action DOCKET NO. C-4122-73

MEMORANDUM OF LAW IN OPPOSITION TO MOTION FOR IMPOSITION OF CONDITIONS ON TRANSFER OF LITIGATION TO COUNCIL ON AFFORDABLE HOUSING SUBMITTED ON BEHALF OF DEFENDANT, TOWNSHIP OF PISCATAWAY

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INTRODUCTION

This memorandum is respectfully submitted on behalf of the Township of Piscataway, in opposition to the application of the plaintiff Urban League, returnable April 25, 1986.

Plaintiff's application derives from Hills Development Co. v. Bernards, - N.J. - (1986) (herein "Mount Laurel III"), which upheld the constitutionality of the Fair Housing Act (herein "Act") and directed that this case, among others, be transferred to the Affordable Housing Council. In so ruling, the Supreme Court concluded that the transfers are "... subject to such conditions as the trial courts may find necessary to preserve the municipalities' ability to satisfy their Mount Laurel obligations." Slip op. at 30.

Having determined that the Council may compel a municipality to preserve "scarce resources" [those resources probably essential to the satisfaction of the Mount Laurel obligation], the Supreme Court further concluded that the judiciary might impose those same conditions designed to conserve "scarce resources" that the Council might require were it fully operative:

> In some municipalities it is clear that only one tract or several tracts are usable for lower income housing, and if they are developed, the municipality as

> a practical matter will not be able to satisfy its Mt. Laurel obligation. p. 87. (emphasis added)

Plaintiff's motion seeks to preclude non-Mount Laurel development on 40 sites, involving 1100 acres, throughout the Township. This is more than "one tract or several tracts"; it is one town. It would restrain development on every "suitable" site in the Township. A coextensive restraint was imposed when Piscataway's fair share obligation appeared to be 4,192 units, which, in this Court's view, justified a restraint applicable to all vacant land deemed "suitable" for high density residential development. The Court defined "suitable" liberally; if the land could be developed for Mount Laurel purposes, it was considered suitable. The Court did not analyze the aggregate effect of high density development on all 40 sites. Having decided in July, 1985, some three weeks after the enactment of the Fair Housing Act, that Piscataway's fair share obligation should be reduced to 2,215 because of its limited vacant land, this Court then extended to Piscataway an opportunity to present additional evidence to refine the concept of "suitability"; Mount Laurel III has rendered that opportunity academic.

Plaintiff now argues that the interests of lower income persons require that the vacant land previously restrained, plis be restrained until the Council determines

Piscataway's fair share number. Piscataway respectfully contends that restraints against non-Mount Laurel development are not justified by the literal language of the opinion of the Supreme Court, as indicated above, and are unrealistic, inappropriate, and unjustified.

The Mallach Certification

Mr. Mallach's certification implies that plaintiff won before the Supreme Court; how else can one explain his view that fair share numbers will be inflated by the Council? The municipalities sought transfer to the Council against the fervent opposition of the Urban League as a rejoinder to the undue and unconscionable numbers produced by consensus methodology. Yet, Mr. Mallach continues to assert, without any basis in fact, that "there is every reason to expect that the Fair Housing allocation figures... will be substantial." (Page 2). An objective review of the procedural history of this litigation as well as the language of the Fair Housing Act offers every reason to expect that the ultimate figures will be substantially below those numbers produced by Mr. Mallach's methodology.

Mr. Mallach acknowledges that the Council adopted the same regions established by the Center for Urban Policy Research in its landmark study (which, incidentally, was moved into evidence in the fair share trial by Piscataway

over the objection of the Urban League). Mr. Mallach concludes that the designation of this region will produce "modest indigenous needs"; he reasons, however, that the selection of this region will produce large overall fair share numbers, despite the fact that the previous regions included counties of substantial population as "providers" of indigenous need, reallocated present need, and prospective need. One can argue with equal facility that the adoption of the Rutgers regions denotes considerable acquiescence to the conservative population projections contained within the CUPR study, which will reduce the fair share numbers even further.

Mr. Mallach argues vehemently that the methodology is too conservative - apparently because he reads Mount Laurel to compel all municipalities to rezone for the full housing need of the State. But all that Mt. Laurel II ever required was that municipalities take on their "fair share" of a housing need. No Mount Laurel case suggests that, as matter of constitutional imperative, towns must provide housing for all persons needing it. The Urban League itself supported a 20% set aside, at the time that the proportion of low and moderate income households in the State was

39.4%.* By contending that the methodology is conservative, Mr. Mallach is clearly illogical; he uses his words to mean exactly what he chooses, neither more nor less. See Carroll, "Alice in Wonderland".

Mr. Mallach concludes that Piscataway's fair share will exceed 2,215 units. There is no authority for this proposition; and Mount Laurel III suggests exactly the opposite. The Supreme Court, first, directs that the municipality is not bound by any order or any stipulation. That certainly suggests that the municipal view was given substantially more credence than that of the Urban League. Second, the Supreme Court clearly states that intelligent persons** should have known that "if ever any doctrine or any remedy appeared susceptible to change, it was [Mount Laurel] and its remedy," implying that the Mount Laurel ruling was shockingly dramatic. And why? Because its implementation produced numbers which were unachievable, impractical, and unacceptable. Third, the Council has broad discretion to adopt theories to determine the need for lower

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* According to the Urban League at trial but now discredited. See Field v. Franklin Township, 206 N.J. Super. 165 (L. Div. 1985).

** Not specifically defined.

income housing, the regional portion of that need, and the standards for allocation to each municipality: "all parameters are different." Slip op., page 71. The existence of regional contribution agreements and the concept of credits, among other things, will further reduce the numbers which municipalities must meet.

It is simply inconceivable how anyone can read Mount Laurel III to mandate fair share numbers larger than those produced earlier.

Mr. Mallach's Certification reflects nothing but an unshaken belief that he retains a pipeline to the dieties of Mount Laurel I and II. Piscataway respectfully submits that Mr. Mallach's conclusions are far from the mark.

The Payne Certification

Mr. Payne's Certification summarizes arguments previously deployed by the Urban League to show that Piscataway's actions over the past twenty years are virtually tantamount to bad faith, i.e., "dingy hands"*.

Piscataway asserts that any methodology must incorporate sound planning criteria. It has never sought exemption from a reasonable Mount Laurel obligation; Pis-

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* Piscataway applauds the literary inventiveness of its adversaries. The "dingy hands" epithet was presented by the Urban League's brief in the Supreme Court.

cataway is one of only three communities in New Jersey in which Mount Laurel housing has actually been built and sold to lower income persons.* Piscataway has zoned hundreds of acres for high density residential development, including one project now before the Piscataway Planning Board which will produce 176 Mount Laurel housing units. Piscataway has done more than any other surburban municipality to accommodate the needs of lower income persons.

Mr. Payne's review of the various restraints in Piscataway is substantially correct, except for his characterizations. The initial restraint was imposed against a parcel adjoining both industrial and residential development (the Sudler parcel). Over Piscataway's objections, this Court restrained development on that site for months. Ultimately, the Court-appointed expert determined that the most appropriate use for that property was light industrial - that use for which it was zoned. The other two restrained properties are a twenty-five acre parcel, the subject of no developmental application other than for its subdivision from an adjoining parcel, and a four acre parcel, owned by a

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* See the New York Times, February 21, 1986, p. 1.

builder, chortling at the prospect of building 40 rather than 16 homes on his 4 acres. No developmental approvals have been rendered with respect to this parcel.

In autumn, 1984, plaintiff moved for a restraint on all parcels of suitable vacant land. Piscataway objected, arguing that the Urban League was adequately protected by receiving notice of all zoning applications, and that the owners of the properties, whose ability to develop their particular parcels would be substantially limited by any restraint, were not parties to this action. This Court approved the restraint, reasoning that Piscataway's fair share number was substantial and much vacant land would be needed to accommodate that number. This reasoning is no longer sound; Piscataway is now dealing with an administrative agency, a smaller region, and an Act which reflects the adoption of a number of points which will reduce the ultimate number - credits, patterns of existing development, and transfers, among others.

Mount Laurel III states, "... we believe the Council is not bound by any orders entered in this matter, all of them being provisional and subject to change, nor is it bound by any stipulations, including a muncipality's stipulation that a zoning ordinance do not comply with a Mount Laurel obligation." The Supreme Court also set up a procedure (invoked by the Urban League on this very motion)

for any party to submit to the trial court reasons why conditions should accompany the transfer of the cases. The Supreme Court did not order that existing restraints continue until vacated by the trial court (as it could have, easily). The Supreme Court did not transfer the cases to the Council on the condition that the interim restraints employed by the trial court remains in effect (as it could have, easily). The Supreme Court did transfer all cases pending before it to the Council. It gave to this Court limited jurisdiction to entertain applications for the imposition of conditions. It described all orders previously entered in this case as "provisional". Therefore, the previous restraints are no longer valid.

It is true that Piscataway's Site 80 was erroneously approved for non-Mount Laurel development two months ago. When it was learned that the Zoning Board had rendered approval of the site to its developer at a density recommended by Ms. Lerman, but with no Mount Laurel component, Mr. Clarkin, attorney for the Zoning Board, was instructed to effect the recission of the approval. He has done so.* Omission of this history by the Urban League is inexcusable, especially in light of the accusations of bad faith on Piscataway's part.

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* See attached correspondence - Exhibit "A".

Lastly, Piscataway is charged with delay and obfuscation. But Piscataway did not suggest the development of the consensus methodology, which took months to refine (the suggestion originated from an attorney for a Cranbury developer). Not Piscataway, but this Court ordered that additional hearings address the vacant land question. Not Piscataway, but the Supreme Court stayed trial proceedings pending review of Piscataway's arguments; that Court, not Piscataway, decided Mt. Laurel III. The real delay here is that the Urban League has stood on its soapbox too long; at long last, it should recognize that virtually every substantive position* adopted by it since the commencement of this litigation has been discredited by one Court or another, and, as to region, by the Council.

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* With the significant exception that all parties acknowledge that the Mount Laurel concept is appropriate.

PLAINTIFF NEEDS NO FURTHER DISCOVERY TO LEARN THAT WHICH IT ALREADY KNOWS.

Plaintiff seeks leave to commence yet another round of discovery against the municipality.** Piscataway respectfully submits that additional discovery is not needed.

Is the Urban League contending with any seriousness that somehow Piscataway's inventory of vacant land has grown since the last tally? As to all sites restrained by this Court's order of December 11, 1984, the vacant land inventory remains the same, except that the Hovnanian development (site 46) has produced 109 Mount Laurel dwelling units and the Canterbury development (site 7) is about to produce 171 Mount Laurel qualified dwellings. No other development has reduced Piscataway's inventory of "suitable" vacant land (as determined by this Court).

Nothing within Mount Laurel III presupposes that this Court has the authority, in the present posture of the case, to impose a discovery condition. This Court was directed by the Supreme Court was to impose such conditions as the Council might impose to preserve scarce resources, were that Council fully operative. Nothing in that grant suggests that the Supreme Court intended this Court to authorize another round of discovery.

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* The third since January, 1983.

The Urban League argues that, despite its earlier acquiescence that a particular site is not suitable for Mount Laurel development, it may now, with impugnity, renege. It seeks to keep that which it has already won and try to recover that which it has earlier lost by its own agreement. Should Piscataway, then, advise this Court that it intends to rezone those hundreds of acres which it has voluntarily elected to zone for high density residential development, because it feels (as it has every reason to) that there are no currently existing operative restraints?

This position reflects the Urban League's predilection for numbers - regardless of legitimate planning criteria. Give us numbers, it clamors, regardless of the effect on present residents.* It ignores the fact that its agreement to release certain sites from "Mount-Laurelization" was fully consistent with the expert report ordered by this Court (and paid for entirely by Piscataway, in the second phase of the litigation). But for one site, owned by Rutgers, the State University, the Urban League agreed completely with this Court's expert.

Piscataway has fully honored the prior restraints imposed and has not entertained development applications on

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* Or, indeed, on the quality of life of prospective residents.

any of the parcels subject to that restraint. To the best of its knowledge, few property owners of parcels previously restrained presently seek to develop their lands for other than Mount Laurel purposes -- site 3, instead as a supermarket, and site 44, intended for development for lower density condominiums. [The Court may recall this site as boasting a sign referring to "luxury condominiums".] As to site 3, as clearly pointed out by counsel in the moving papers, extensive discussions and negotiations have taken place by and between the Urban League and the developer; a shopping center application is presently before the Planning Board and known to the plaintiff.

The point is that Piscataway is unaware of the clamoring of developers to develop tracts of land at low density. In light of the fact that, according to a recent Affordable Housing Council seminar, the Council plans to release its guidelines by June, 1986,* no developmental approval can possibly be rendered on the balance of Piscataway's vacant land until that time. The conditions sought, therefore, will shortly be moot.

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* And must therefore decide upon criteria for submission to a printer by early May.

In summary, Piscataway views the requests for discovery, whether by interrogatories or depositions, as inappropriate, and as subjecting the Township of Piscataway to annoyance and oppression, among other things within the spirit and letter of Rule 4:10-3.

THIS MATTER SHOULD BE TRANSFERRED UNCONDITIONALLY.

As to the imposition of conditions preventing non-Mount Laurel development on any vacant land, Piscataway reiterates that there is no need for such conditions. Property owners, not parties to this lawsuit, will feel the economic effect of such restraints in the future. If the Urban League really believed its own allegations, it would have moved to designate the owners of every parcel of property in Piscataway Township exceeding (say) ten acres in areas as parties to this litigation and before the Council, to permit those individuals to participate, as parties defendant, in all future proceedings.* That position, of course, was resisted by the Urban League in November and December, 1984, and is not averred to in any respect in its moving papers.

Plaintiff mistakenly alleges that Piscataway's "proper" fair share finding should have been 3,744.

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* Could it only have been months ago that the Urban League sought to deny transfer to the Council based, in part, on a vested rights theory -- arguing that the numbers determined by this Court after 11 years of litigation "belonged" to it?

That number represented the fair share number to be effected by 1990; the fair share number determined by the formula was 4,192, with approximately 225 units to be phased in in 1990, and 225 units more to be phased in in 1996. It was the magnitude of this number, and the magnitude of the number ascribed to Cherry Hill (exceeding 8,000), and the magnitude of the number ascribed to Franklin (exceeding 2,000) and the other numbers produced by the formula which caused the public clamor resulting in the Fair Housing Act. The Urban League should be intellectually estopped from taking a result now discredited in its entirety and repeating that result as though anyone considered it credible.

Picataway strongly maintains that the fair share ascribed to Piscataway by the Council will produce a result which, after consideration of credits, will require no rezoning additional to that which Piscataway has voluntarily done. Piscataway submits, therefore, that there is no proper "benchmark" against which to measure scarcity. One person's guess is as good as another, and it is unfair and inequitable to restrict all development without clear authorization from the Supreme Court to do so unless one can, with some degree of certainty, determine the ultimate magnitude of Piscataway's obligation.

Piscataway is accused of prolonging the hearing unreasonably by objecting to "each and every site" recommended by Ms. Lerman. Of course, this accusation ignores the fact that Ms. Lerman recommended as suitable and appropriate every site which Piscataway had previously rezoned for high density residential development with a Mount Laurel component, including site 7, now being developed, site 30, site 46 (now being developed), and site 57, as well as the acreage for senior citizen housing -- site 53 [exceeding 213 acres in the aggregate]. Piscataway did argue that one should not look at each site in a vaccuum; that it was essential to consider the utility support for each site; that the conclusions reached should take into account the aggregate impact of wholesale development for high density residential dwellings on all of the sites recommended as suitable by the expert; and many other issues. Piscataway's opposition to Ms. Lerman's recommendations had a substantially credible basis; the governing body had concluded that there were higher and better uses for the lands in question, and that, given Piscataway's socioeconomics, 213 additional acres devoted to high density residential dwellings was sufficient. To a large extent, the existence of a credit provision in the Fair Housing Act and the existence of the mandate to the Council to consider the pattern of existing development is a direct response

to Piscataway's arguments [and those of municipalities similarly situated].

The Urban League argues that small sites should now be addressed with greater intensity, because of the existence of alternatives to the four-to-one set asides. But, if one assumes the existence of alternatives such as credits for affordable rental housing and credits for existing affordable sale, and credits for family housing of Rutgers University occupied by lower income persons, the fair share number to be met by rezoning will be substantially lower than the numbers previously considered by this Court. The Urban League seeks to persuade this Court that a community which has done more than any other non-urban aid community in the State to develop a diverse class of housing should be treated as though it had erected a fence around its borders and had solemnly determined to exclude the poor. This was the kind of argument originally mooted by the Urban League in 1984 and 1985; enough, Piscataway respectfully contends, is enough.

PISCATAWAY RESPECTFULLY URGES THIS COURT TO DENY THE APPLICATION RENDERING ITS CONSENT NUGATORY.

The Urban League's final point is that it should be permitted to submit orders dealing with Piscataway's land development to this Court without obtaining the consent of Piscataway's counsel thereto. The Urban League has cited no authority for the startling proposition that "the consent of the municipality is not needed to release a site from restraint" imposed by Court Order. It argues that it, no longer a plaintiff in functioning litigation has a greater interest in land developments than the town in which the development lies. Piscataway disagrees.

THIS COURT LACKS JURISDICTION TO ORDER THAT PLAINTIFF'S COUNSEL MAY APPEAR ON PLAINTIFF'S BEHALF BEFORE THE AFFORDABLE HOUSING COUNCIL; IN ANY EVENT, THIS COURT CANNOT ERADICATE A PATENT APPEARANCE OF CONFLICT

Plaintiff asks this Court to permit the Constitutional Litigation Clinic of Rutgers Law School (the "Clinic") to represent the Urban League before the Affordable Housing Council ("Council").

Piscataway urges that (a) this Court does not have the jurisdiction to determine whether the Clinic may appear before the Council; (b) assuming, arguendo, that this Court has jurisdiction, the Clinic is in an apparent conflict of interest vis-a-vis Piscataway and may not properly continue to represent the Urban League.

Piscataway, a defendant herein, clearly has standing to oppose the Urban League's motion and to challenge the Clinic. See Messing v. FDI, Inc., 439 F. Supp. 776 (D.N.J., 1977).

The February, 1986 transfer of twelve cases from the Court to the Council vested no jurisdiction in this Court to determine questions regarding the legal representation of any party. This Court was afforded limited jurisdiction to entertain applications for the imposition of interim conditions only; it may not hear or decide any other matters. See Mount Laurel III.

The issue of who may appear before the Council as the legal representative of plaintiff should be decided by the Council. This position is supported by administrative rules (N.J.A.C. 1:1-8.8(b), 1:13-7(a), and 1:1-39, among others) and the New Jersey Court Rules; an agency (or an Administrative Law Judge, where applicable) may rule on the propriety of the appearance of counsel before it - not a court. Stone Harbor v. Div. of Coastal Resources, 4 NJAR 101 (OAL, 1980).

The Urban League might also seek authorization to appear before the Council from the Joint Legislative Committee on Ethical Standards [see N.J.S.A. §52:13D-22] but there exists no administrative regulation authorizing this Court to rule on that question.

In summary, this Court has not been authorized to rule on the representation question by Mount Laurel III or by any other law; furthermore, no court may address the issue by advisory opinion, as plaintiff asks this Court to do.

N.J.S.A. §18A:62-2 (establishing Rutgers as the State University) specifically designates Rutgers as "the instrumentality of the State for the purpose of operating the state university." Our Supreme Court also unequivocally acknowledged the status of Rutgers as an arm of the State in Rutgers v. Piluso, 60 N.J. 142, 153 (St. Ct.,

1972) describing Rutgers as an "instrumentality of the State performing an essential governmental function for the benefit of all the people of the State."

Thus, the Clinic, as a part of Rutgers University, fits within the literal language of the statute cited by the moving party; the literal conflict of interest prohibited by that statute clearly exists.

No less clear is the conflict of interest defined by the Code of Ethics of by the Department of Higher Education. That Code, applicable to those "employed in the New Jersey Department of Higher Education, Colleges ... and universities under its jurisdiction", provides in pertinent part (at N.J.A.C. 9:2-10.1):

> (b)(1) No officer or employee should have any interest, financial or otherwise, direct or indirect, or engage in any business or transaction or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest.
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> * * *
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> (7) No officer or employee should knowingly act in any way that might reasonably be expected to create an impression or suspicion among the public having knowledge of his acts that he may be engaged in conduct violative of his trust as a State officer or employee. (N.J.A.C. §9:2-10.1)

The Memorandum of Law submitted by the moving party ignores this Code; it attempts to evade the Conflicts

of Interest Law by relying, in part, on Hovsons, Inc. v. Secretary of Interior, 711 F.2d 1208 (3d Dir., 1983) where it was held that even if a conflict of interests exists, disqualification is not always appropriate. Plaintiff's argument ignores the factual basis of that decision. In Hovsons, the Secretary of the Interior sought to disqualify counsel who, as a part-time National Guard lawyer, had helped to formulate plans respecting the New Jersey Pinelands, which plans were being objected to by his private clients! The Third Circuit, finding the case to be "a rare but good example of when disqualification would neither be just nor fair to the parties involved," permitted counsel to appear, largely on the basis that plaintiff likely did not have standing to challenge the Pinelands plans and was not likely to prevail if it did, its position lacking substantive merit. Thus, the Court refused to disqualify counsel on the ground that no harm could be done because his client's challenge was "effectively a nullity." Id. at p. 1213.

While there may be merit in the Hovsons court's position that disqualification should not follow merely as a matter of course when no harm is done, such is not the case here. Rutgers University, of which the Clinic is a part, owns approximately 10% of Piscataway's land. Substantial portions of the University's land are vacant. The

Urban League and the Clinic have taken positions as to the suitabilty of those lands in the past and will likely be compelled to do so in the future. Indeed the Urban League argues (hopefully to no avail) that it may relitigate its position and seek to have deemed "suitable" in 1986 that which they deemed "exempt" in 1984. No one - neither the Urban League, nor Piscataway, nor the Council, nor the public - can know whether the Clinic's position as to any parcel of land reflects its view of the best interests of its client or reflects its status as an agent of Rutgers University.*

Suppose that a municipal attorney owned vacant

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* Piscataway's circumstances may be qualitatively different from those of other defendant municipalities, such as Monroe or Cranbury, because of the presence of Rutgers within its borders. However, as the Urban League pointed out in its brief to the New Jersey Supreme Court, the unusual nature of the consolidation of the Urban League matters means that what affects one, affects all. Surely the position to be adopted by the Urban League before the Council regarding a formula for the determination of fair share will not change depending on each municipality. It is no answer to the clear and patent conflict to suggest that the implementation of the formula will vary from town to town and, therefore, no conflict is presented.

land in the town which he represents. Is there not a clear appearance of conflict, espedically where the municipality must elect which parcels, among many, require rezoning? Counsel may assure the Court of his bona fides, but can the Court (or even counsel himself) ever be certain that he has not elected a path in his own self-interest? The purpose of conflicts of interest rules and codes of ethics is to prevent the problem from arising in the first place.

The clinic is in precisely that type of conflict - or appearance of a conflict - at which the Conflict of Interest Law and the Code of Ethics are aimed. Based on the plain language of the Conflicts of Interest Law and the existence of an actual conflict of interest, the Clinic's application should be denied on the merits.

CONCLUSION

For the foregoing reasons, Piscataway respectfully submits that the relief sought by the Urban League should be denied in its entirety.

Respectfully submitted,

KIRSTEN, FRIEDMAN & CHERIN
A Professional Corporation
Attorneys for Defendant
TOWNSHIP OF PISCATAWAY

By _____
Phillip Lewis Paley

Dated: April 16, 1986

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March 26, 1986

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RE: Urban League v. Carteret and Piscataway
Our File No. 10004

Dear Phil:

This letter shall confirm that the Piscataway Township Zoning Board of Adjustment rescinded the approval previously given to Lackland Brothers, Inc. for a variance permitting development on Site 80. A Resolution rescinding the approval will be memorialized at the Board's meeting on April 22, 1986. This information should be of assistance to you in responding to Paragraph 12 of the Certification of John M. Payne, Esq. filed in connection with the Urban League's Notice of Motion for Imposition of Conditions on Transfer.

Very truly yours,

JAMES F. CLARKIN III

JFC/klh

EXHIBIT "A"