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Petition for Certification to The Superior Ct.

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SUPREME COURT OF NEW JERSEY

DOCKET NO. 16,492 TERM 79

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,	:	Civil Action
Plaintiffs-Petitioners,	:	
v.	:	Sat below:
	:	Honorable Joseph Halpern, J.A.D.
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al.,	:	Honorable John L. Ard, J.A.D. Honorable Melvin P. Antell, J.A.D.
Defendants-Respondents.	:	

PETITION FOR CERTIFICATION TO THE SUPERIOR COURT, APPELLATE DIVISION AND APPENDIX

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TABLE OF CONTENTS

	Page
TABLE OF CITATIONS	iii
INTRODUCTION	1
QUESTION PRESENTED	3
POINT I. DEMARCATION OF A REGION IS NOT AN ESSENTIAL ELEMENT OF PROOF THAT A ZONING ORDINANCE IS UNCONSTITUTIONALLY EXCLUSIONARY	3
POINT II. PLAINTIFFS AND THE TRIAL COURT BOTH VIEWED REGION, IN THE MT. LAUREL SENSE, AS EXTENDING BEYOND THE BOUNDARIES OF MIDDLESEX COUNTY	7
POINT III. EVEN IF THE TRIAL JUDGE ERRED BY DEFINING THE REGION TOO NARROWLY, THE ERROR WAS NOT PREJUDICIAL	12
POINT IV. THE APPELLATE DIVISION SHOULD HAVE REMANDED THE CASE FOR FURTHER CONSIDERATION, IN LIGHT OF THIS COURT'S LATER DECISION IN MADISON	14
POINT V. CERTIFICATION SHOULD BE GRANTED BECAUSE THE GROUNDS FOR CERTIFICATION ARE FULLY MET BY THIS CASE	17
CONCLUSION	19
CERTIFICATE OF COUNSEL	20
CERTIFICATE OF SERVICE	

APPENDIX **Page**

Trial Court Opinion..... Pa1

Opinion of Appellate Division..... Pa17

Notice of Petition for Certification..... Pa34

TABLE OF CITATIONS

CASES

	Page
Budget Corp. of America v. De Felice, 46 N.J. Super. 489 (App. Div. 1957)	15, 16
Oakwood at Madison, Inc. v. Township of Madison, 128 N.J. Super. 438 (Law Div. 1974)	11
Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481 (1977)	3, 6, 7, 8, 10, 11, 13, 14, 15, 16, 18, 19, 20
So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151 (1975)	1, 2, 4, 6, 7, 8, 9, 10, 11, 14, 17, 18
Urb. League of New Bruns. v. Mayor & Coun. Carteret, 142 N.J. Super. 11 (Ch. Div. 1976)	2, 4, 5, 10

STATUTES

Title VIII of the Civil Rights Act of 1968 (the Federal Fair Housing Act), 42 U.S.C. 3601 et seq.	16
Housing and Community Development Act, 42 U.S.C. 5301 et seq.	5, 12

COURT RULES

New Jersey Court Rules Governing Appellate Practice	
R.2:2-1(a)	17
R.2:12-14	17

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PETITION FOR CERTIFICATION TO
THE SUPERIOR COURT, APPELLATE DIVISION

INTRODUCTION

The class action which is the subject of this appeal constitutes a challenge to the land use policies and practices of 23 suburban municipalities of Middlesex County. */ The suit was filed in July 1974, eight months before this Court issued its landmark opinion in So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151 (1975) (hereafter Mt. Laurel). Plaintiffs, on behalf of low and moderate-income persons, charged that the zoning ordinances, policies, and practices of the defendants were exclusionary, in violation of the New Jersey Constitution and state and federal laws.

*/ New Brunswick and Perth Amboy, the County's older central cities, in which the lower income and minority population is disproportionately confined, were the only municipalities in Middlesex County not named as defendants.

After seven weeks of trial, on May 4, 1976, the trial judge, the Honorable David D. Furman, J.S.C., rendered his decision in the case, holding that the zoning ordinances of 11 of the defendant municipalities were constitutionally invalid under Mt. Laurel. */ Urb. League New Bruns. v. Mayor & Coun. Carteret, 142 N.J. Super. 11 (Ch. Div. 1976).

On September 11, 1979, the Superior Court, Appellate Division, per Judges Halpern, Ard, and Antell, reversed the trial court, without remand, ruling that both the plaintiffs and the trial court had employed an improper demarcation of the geographical boundaries of the region and that proper definition of "region" is essential to proving that a municipality's zoning ordinance is unconstitutionally exclusionary. In so ruling, the Appellate Division expressly decided not to remand the case to the trial court. **/

Plaintiffs submit this Petition seeking reversal of the Appellate Division's decision. In support of this Petition, plaintiffs argue, as follows:

First, an accurate demarcation of the geographical boundaries of the region is not an essential element in proving the constitutional invalidity of exclusionary zoning laws.

Second, both the plaintiffs, and the trial court, defined the region--the area from which the population of Middlesex County

*/ Eleven other defendants were dismissed after they agreed to adopt appropriate amendments to their zoning ordinances. One defendant was dismissed outright during trial.

**/ In so deciding, the Appellate Division assumed that a "new trial" would be required. Slip Opinion at 18. Because the record of the seven-week trial contains abundant evidence on the issue of region, see discussion, infra, a remand to the trial court would necessitate that little, if any, additional evidence be presented.

would be drawn absent exclusionary zoning--as extending far beyond the confines of Middlesex County, alone.

Third, even if Judge Furman erred by demarcating the geographical boundaries of the region too narrowly, that error was not prejudicial.

Fourth, in view of the fact that this Court's decision in Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481 (1977) (hereafter Madison) was rendered more than eight months after Judge Furman's decision in this case, the Appellate Division should have, at the least, remanded the case for further consideration in light of the Madison decision or for additional evidence, if necessary.

Finally, this Court should grant plaintiffs' Petition in that all the requisite grounds for Certification have been met.

QUESTION PRESENTED

The question presented by this appeal can be stated as follows:

Is the definition of "region" essential to a trial court's determination that a zoning ordinance is unconstitutionally exclusionary?

POINT I. DEMARCATION OF A REGION IS NOT AN ESSENTIAL ELEMENT OF PROOF THAT A ZONING ORDINANCE IS UNCONSTITUTIONALLY EXCLUSIONARY.

In its September 11 opinion the Appellate Division ruled that "the definition of ... a region is essential to prove that the defendants exclude [low and moderate income] housing through their choice of zoning policies...." Slip Opinion at 17 (emphasis supplied.) On that basis, the court concluded that, since the trial court had improperly defined the region, its holding that the zoning ordinances of the 11 defendant municipalities were uncon-

stitutionally exclusionary had to be overturned.

In Mt. Laurel this Court set forth the basic principle governing plaintiffs' burden of proof in exclusionary land use cases:

> [W]hen it is shown that a developing municipality in its land use regulations has not made realistically possible a variety and choice of housing, including adequate provision to afford the opportunity for low and moderate income housing or has expressly prescribed requirements or restrictions which preclude or substantially hinder it, a facial showing of violation of substantive due process or equal protection has been made out....

67 N.J. at 180-181. (emphasis Supplied) Judge Furman followed this principle in the instant case by analyzing, in meticulous detail, the various ways in which the zoning laws of the defendant municipalities precluded or hindered the provision of low and moderate-income housing. 142 N.J. Super. 28-35.

In reaching his decision that the defendants' zoning laws were constitutionally invalid, Judge Furman found a "pattern of dwindling low and moderate-income housing opportunities" in Middlesex County, 142 N.J. Super. at 20. He discussed the "overwhelming needs for low and moderate-income housing in the State as a whole," Id. at 19, needs which this Court in Mt. Laurel, characterized as "desperate". 67 N.J. 158. He then described the housing conditions in Middlesex County:

> Minimal modest lot single-family housing has been built. Housing congestion is worsening in the urban ghettoes. New mobile homes are prohibited in all municipalities. Thirteen municipalities have enacted rent control ordinances in response to the multi-family housing shortage. Vacancy rates are low. Despite overzoning for industry, new industry is reluctant to settle in the county because of the shortage of housing for its workers.

> Experts for various defendants acknowledged a substantial market and a pressing need for new low and moderate housing.

142 N.J. Super. at 20. Judge Furman concluded: "In Middlesex County, the shortage of low and moderate-income housing is critical." Id.

In short, Judge Furman was not determining the validity of the defendants' zoning laws in a vacuum, or in the context of a geographical area in which the population was well housed or where the need for low and moderate-income housing was minimal. Rather, his ruling was based on a careful consideration of the reality of a "critical" housing shortage in Middlesex County, a rapidly growing urban county. */ Thus no matter how broadly or narrowly the region for Middlesex County is geographically demarcated, there is no question that a substantial need for low and moderate-income housing exists, a need that cannot be met, in large part because of the defendants' exclusionary zoning laws.

In overturning the trial court opinion, the Appellate Division did not even consider Judge Furman's specific determination that the defendants' zoning laws were unconstitutionally invalid. Rather, the sole basis for the Appellate Division's decision overturning Judge Furman's holding that the defendants' zoning laws are constitutionally invalid was that he had not properly defined the geographical boundaries of the region.

*/ Middlesex County has consistently applied for, and received, funds under the federal Housing and Community Development Act, 42 U.S.C. 5301, et seq., as an urban county.

Plaintiffs submit that this ruling by the Appellate Division, if permitted to stand, would introduce a new element to plaintiffs' burden of proof in exclusionary land use cases, an element never before required by this Court or any other court. Plaintiffs further submit that this ruling is in direct conflict with both Mt. Laurel and Madison, the two cases in which this Court has determined the constitutionality of the zoning laws of developing municipalities.

Neither in Mt. Laurel or Madison did this Court require specific demarcation of the region as a necessary prerequisite to a judicial finding that a zoning law is unconstitutionally exclusionary. Indeed, in neither case, did the trial court even attempt to demarcate the geographical boundaries of the region. Yet, in both cases, this Court upheld the trial court's holding that the zoning laws of the respective defendant municipalities were invalid.

In Mt. Laurel, the trial judge considered the validity of the defendant's zoning law strictly within the context of Mt. Laurel, alone. Indeed, the Supreme Court, per Justice Hall, expressly noted that the trial court's holding "was limited to Mt. Laurel-related low and moderate income housing needs." 67 N.J. at 189. Nonetheless, this Court affirmed the lower court's ruling that Mt. Laurel's zoning law was invalid.

Similarly, in Madison, this Court specifically noted that "the trial court did not specify the precise boundaries of the applicable region...." 72 N.J. at 498. Instead, the trial judge--Judge Furman--had "merely described the pertinent region as the area from which the population would be drawn, absent exclusionary

zoning." Id. This Court upheld Judge Furman's ruling that Madison Township's zoning law was invalid. The Court held that the Township's ordinance was "clearly deficient", Id. at 543, stressing that the trial court was not required to "specify a pertinent region." Id.

Plaintiffs argue that, as in Mt. Laurel and Madison, failure to demarcate the geographical boundaries of the region does not nullify Judge Furman's ruling that the defendants' zoning laws are constitutionally invalid. As this Court made clear in both cases, precise demarcation of such boundaries is not an essential element prerequisite to a judicial determination of constitutional invalidity.

POINT II. PLAINTIFFS AND THE TRIAL COURT BOTH VIEWED REGION, IN THE MT. LAUREL SENSE, AS EXTENDING BEYOND THE BOUNDARIES OF MIDDLESEX COUNTY.

The Appellate Division determined that Judge Furman incorrectly defined the region in this case as coextensive with Middlesex County, and that this was, in large part, a result of plaintiffs' deficient proofs. Plaintiffs contend that they and the trial court both viewed region, in the Mt. Laurel sense, as extending beyond the boundaries of Middlesex County.

Both during and after trial plaintiffs maintained that the region was larger than the county. For example, in their post-trial brief plaintiffs included a section entitled, "The Defendant Municipalities All Are Part of Middlesex County, Which Is the Relevant Geographical Unit into which Radiates the Low and Moderate Income Housing Need of the Larger Region." In that section plaintiffs stated:

> [A]s plaintiffs pointed out in their Brief, the relevant region in this case is not the County. Rather, the region is defined functionally, in terms of the housing need, both within the County and radiating into the County from outside. Plaintiffs' Brief at 23. The importance of the County itself lies in the fact that it is the relevant geographical unit into which the regional low and moderate-income housing need radiates.

Plaintiffs' Reply Brief at 44-45. */

This broad concept of region is replete in testimony and other evidence contained in the record. For example, Ernest Erber, one of plaintiffs' expert witnesses, stressed throughout the course of his testimony and in the numerous exhibits he prepared that were admitted into evidence, that the relevant region extended well beyond the boundaries of Middlesex County. **/ Indeed, this point was underscored through defendants' cross-examination of Mr. Erber:

> Q: Now, you gave some testimony as to the region in which we live. Is that correct?
>
> A: Yes.
>
> Q: And it's your opinion that the region is Middlesex County?
>
> A: Well the region is the New York Metropolitan Region.

*/ In this brief plaintiffs underscored the fact that in Mt. Laurel this Court made clear that the applicable region is not confined to county lines. Plaintiffs also used and supported the trial court's definition of region in Madison.

**/See, e.g. P-21: Journey to Work in the Tri-State Region, June 1964; P-22: Table B-2, Preliminary 1970 Census Journey to Work, Including Outside the Region; P-23: Interim Technical Report Number 4088-6051-6556, Transportation, The Link Between People and Jobs. A Profile of Low Income Households in the Tri-State Region, June 1968; P-27: Substandard Housing in the Tri-State Region, June 1968; P-33: Housing Needs for the Tri-State Region; P-38: An Analysis of Low and Moderate Income Housing Need in New Jersey, New Jersey Department of Community Affairs, Division of State and Regional Planning.

Q: The Region is not Middlesex County?

A: No.

T-Feb. 17-17-12 to 17-20

* * *

Q: Would you agree or disagree with the statement that the location of actual or prospective employment centers and availability of transportation facilities are among the major considerations in the location choice of the working population?

A: I wouldn't disagree, no.

Q: How about the quote, "Rather it is the area from which in view of available employment and transportation that population of a township will be drawn, absent invalid exclusionary zoning."

A: I would agree with that.

Q: The source of that is, I think, Judge Furman.

A. What's that?

Q: I think that's Judge Furman.

T-Feb. 17-136-22 to 137-11 */

Thus, contrary to the Appellate Division's view, plaintiffs consistently took the position that the relevant region, in the Mt. Laurel sense, extended beyond the boundaries of Middlesex County, alone.

---

*/ In addition to testimony, other evidence was introduced which showed the patterns of commuters into Middlesex County of those who do not live in the County. Some of that evidence was used by Mr. Erber to formulate a fair share model.

Judge Furman's position is entirely consistent with that of plaintiffs, as maintained throughout trial and as expressed in their post-trial brief. In his opinion, he made it clear that, for purposes of determining housing need, the "region" extended beyond the confines of Middlesex County. For example, in his analysis of the low and moderate-income housing need projected to 1985, Judge Furman specifically included the need for housing "for most of those filling new jobs in the county." 142 N.J. Super. at 36. This obviously includes those persons now residing outside the County, who would be seeking housing within the County because of new employment opportunities. Judge Furman further found that "Middlesex County is part of the New York metropolitan region." 142 N.J. Super. at 21, and that the County was a region "within larger metropolitan regions". Id. at 22.

In short, Judge Furman, in determining housing need, plainly considered a region larger than the County itself, from which the prospective population of the County would be drawn. This is the teaching of this Court's opinion in Mt. Laurel, with which Judge Furman was thoroughly familiar. It is also the teaching of the opinion in Madison. Furthermore, it is exactly the formulation Judge Furman used in his trial court opinion in Madison, which the Supreme Court affirmed.

In Madison Judge Furman stated:

> The region, the housing needs of which must be reasonably provided for ... is in the view of this court, not coextensive with Middlesex County. Rather, it is

> the area from which, in view of available employment and transportation, the population of the township would be drawn, absent invalid exclusionary zoning.

128 N.J. Super. 438, 441 (Law Div. 1974) It is inconceivable that Judge Furman, the author of the broad definition of "region" in Madison, would suddenly restrict that definition to the County, alone, especially in the context of a county-wide suit in which Madison Township was again a defendant.

Judge Furman did, however, use the term "region" in a second sense. This use was not as a term of art in the Mt. Laurel or Madison sense, but rather to establish that Middlesex County, "for the purpose of this litigation," 142 N.J. Super. 22, was the relevant area into which the population from the larger region would be drawn. This second use of the term "region" is also consistent with the position of plaintiffs, as expressed in their post-trial brief. It derives from the fact that the suit was county-wide, involving as defendants 23 of the 25 municipalities in Middlesex County. */

The trial court was concerned in this case, not with the problem of exclusion from a single municipality, but with the aggregate or cumulative impact of exclusion from a large number of municipalities throughout the County. As Judge Furman expressly recognized, the exclusion here is "compounded in effect". 142 N.J. Super. at 25. As Judge Furman also expressly recognized, Middlesex County is "an integrated economic and social unit, Id. at 21.

*/ As plaintiffs acknowledged during oral argument, our appellate brief, submitted in August 1976, did not adequately draw a distinction between these two uses of the term, thereby contributing to the confusion concerning the regional concept in this case. For this reason and because of the importance of this case for future exclusionary land use litigation, if this petition is granted, plaintiffs will move this court for leave to file a short supplemental brief.

For these reasons and the fact that 23 of the 25 municipalities in the County were defendants, Judge Furman saw Middlesex County as the geographical unit into which the population of the larger region would be drawn. That is, Judge Furman was concerned here with determining the defendant municipalities' fair share of the present and prospective regional need for low and moderate-income housing. It was in this second sense--for purposes of fair share--that Judge Furman stated Middlesex County was a region. */

POINT III. EVEN IF THE TRIAL JUDGE ERRED BY DEFINING THE REGION TOO NARROWLY, THE ERROR WAS NOT PREJUDICIAL.

In the previous section, plaintiffs showed that both they and Judge Furman viewed the term region--the area from which the population of Middlesex County would be drawn absent exclusionary zoning--as extending beyond Middlesex County. But even if the trial court viewed the region as restricted to Middlesex County, alone, plaintiffs contend that the error was not prejudicial and should not be grounds for reversing the trial court's decision that the defendants' zoning laws are constitutionally invalid.

Both the evidence and Judge Furman's opinion demonstrated that there is a critical need for low and moderate-income housing in Middlesex County, a need that cannot be met, in large part because of the defendants' exclusionary zoning laws. According to Judge Furman's estimate, the need, within the 11 defendant municipalities, alone, projected to 1985, was more than 18,000 new units. If, indeed Judge Furman demarcated the region too narrowly, then, if anything, he underestimated the unfulfilled housing need caused by defendants' exclusionary zoning laws. Under a broader geographical demarcation,

*/ As Judge Furman correctly observed the County has been designated a Standard Metropolitan Statistical Area (SMSA) by the federal Office of Management and Budget. Twenty of the municipalities joined in an application for federal funds under the Housing and Community Development Act of 1974 as an "urban county", and the County Planning Board has developed a county-wide master plan.

the need for low and moderate-income housing in Middlesex County, the shortage of which he accurately described as "critical," would be even greater and the correctness of his ruling that the defendants' zoning laws were unconstitutionally exclusionary would be underscored even more.

The 1978 Statewide Housing Allocation Report for New Jersey, prepared by the New Jersey Department of Community Affairs (DCA), demonstrates this point. */ Under the DCA plan, Middlesex County is included as part of an eight-county region. Under this plan, the total housing need to be met by the 11 defendants by 1990 (34,860 additional units) is nearly twice the number (18,697) that Judge Furman estimated by 1985. Further, under the DCA plan, all but two of the 11 defendants are assigned fair share units in greater numbers than those calculated by Judge Furman. **/

Thus, assuming Judge Furman did designate Middlesex County as the region, rather than a larger geographical area, that error was harmless. Certainly it was not, as the Appellate Division ruled, an error that calls for reversal of the trial court's ruling that the defendants' zoning laws are unconstitutionally exclusionary.

*/ The 1976 DCA Preliminary Housing Allocation Report, a preliminary version of the 1978 Final Report, was cited numerous times by the Supreme Court in Madison, supra, 72 N.J. at 528 n. 35, 531-532 n. 37, 535 n. 42, and 538 n. 43.

**/	Trial Court	D.C.A.
Cranbury	1,351 units	679
East Brunswick	2,649	3,083
Edison	2,625	8,023
Monroe	1,356	2,325
North Brunswick	1,513	1,604
Old Bridge	1,634	4,684
Piscataway	1,333	5,299
Plainsboro	1,333	624
Sayreville	1,661	2,321
South Brunswick	1,486	3,213
South Plainfield	1,749	3,000

POINT IV. THE APPELLATE DIVISION SHOULD HAVE REMANDED THE CASE FOR FURTHER CONSIDERATION, IN LIGHT OF THIS COURT'S LATER DECISION IN MADISON.

The Appellate Division in reversing the trial court's decision, refused to remand this case to the trial court because the region, which it viewed as an essential element of the case, had been incorrectly defined by the trial court, and because plaintiffs had failed to carry their burden of proving the relevant region beyond the confines of Middlesex. Plaintiffs maintain that, even if the Appellate Division's decision was correct, the case should have been remanded to Judge Furman for further consideration.

At the time of trial, the only authoritative guidance for both the parties and the trial court as to the issue of region was this Court's opinion in Mt. Laurel. It was more than eight months after Judge Furman's decision in this case that this Court issued its long-awaited decision in Madison. In the course of its lengthy and detailed opinion, this Court provided needed clarification on the definition of region for purposes of determining housing need. Since neither the parties in this case nor the trial judge had the benefit of the Madison opinion, reliance on that opinion by the Appellate Division called for a remand to afford the trial judge, at the least, an opportunity to reconsider his decision in light of recent authority from this Court. In addition to the extent that the Appellate Division viewed plaintiffs' proofs as insufficient, plaintiffs should have been allowed an opportunity to supplement the record in light of recent,

clarifying case law and other significant developments. */

In declining to remand the case, the Appellate Division stated as its reason:

> To do so would merely serve the purpose of allowing plaintiffs to pursue a theory which they eschewed in an earlier trial on an issue as to which they had the burden of proof.

Slip Opinion at 18. In support of its refusal to remand, the Appellate Division cited one case, Budget Corp. of America v. De Felice, 46 N.J. Super. 489 (App. Div. 1957). Plaintiffs point out that the decision not to remand in Budget Corp. was made in a factual and legal context entirely different from that in the instant case.

In Budget Corp. the decision not to remand was made only after the court had previously ordered a remand for additional findings of fact. Thus the appellant had already had a second opportunity to present evidence sufficient to satisfy its burden of proof. Accordingly, the court saw no equitable reason to afford appellant still another chance, especially since the legal burden of proof had never been in doubt.

In the instant case, by contrast, plaintiffs' legal burden of proof on the issue of region was far from clear at the time of trial.

*/ Among the significant developments subsequent to Judge Furman's decision in this case is adoption of the final State allocation plan developed by the Division of State and Regional Planning in the Department of Community Affairs (DCA). In Madison this Court stated that it might conceivably view a region constructed pursuant to such a plan and fair share allocations derived from that region "as meriting prima facie judicial acceptance." 72 N.J. at 538. In the final state plan Middlesex County is included in a region with seven other counties: Bergen, Essex, Hudson, Morris, Passaic, Somerset and Union.

Plaintiffs' one opportunity to present their proofs was well before this Court, in Madison, provided needed clarification on the issue of region. Indeed, the Madison decision intervened between Judge Furman's decision in the instant case and that of the Appellate Division. Thus, neither the parties, nor Judge Furman had the benefit of the guidance afforded by the Madison opinion in either developing their proofs or in determining the precise part that region played in satisfying plaintiffs' burden of proof. For this reason, plaintiffs contend that, unlike Budget Corp., this case plainly calls for a remand.

Plaintiffs further stress that the adverse effect of the Appellate Division's failure to remand the trial court will be no less than monumental. This litigation is a certified class action under the New Jersey rules. Accordingly, the result of the Appellate Division's opinion is to immunize the defendants' zoning ordinances from legal challenge by lower income persons. The result of the Appellate Division's decision not to remand the case to the trial court will inevitably be to render the guarantees provided by the State Constitution without meaning or effect for the thousands of low and moderate income persons who are seeking decent, safe, affordable housing in Middlesex County. These guarantees will have simply been rendered judicially unenforceable. */

*/ In its September 11 decision, the Appellate Division also ruled that the trial court erred in dismissing plaintiffs' claim of racial discrimination under Title VIII of the Civil Rights Act (the Federal Fair Housing Act), 42 U.S.C. 3601 et seq. Slip Opinion at 6-7. The panel's reversal without remand, therefore, precludes plaintiffs from pursuing this additional claim for relief.

POINT V. CERTIFICATION SHOULD BE GRANTED BECAUSE THE GROUNDS FOR CERTIFICATION ARE FULLY MET BY THIS CASE.

The New Jersey Court Rules Governing Appellate Practice set forth the grounds upon which certification may be granted by this Court. R. 2:12-4. These grounds are: (1) that the appeal presents a question of general public importance which has not been but should be settled by this Court; (2) that the decision under review is in conflict with a decision of the same or higher court or calls for the exercise of this Court's supervision; and (3) in other matters, that the interest of justice requires certification. Plaintiffs respectfully submit that this case fulfills all three grounds for granting certification. */

A Question of Public Importance

The nature of this case is such that it necessarily involves a question of great general public importance. This Court has explicitly recognized that decent shelter is a fundamental right. In Mt. Laurel, the Court stated, "There cannot be the slightest doubt that shelter, along with food, are the most basic human needs." 67 N.J. at 178. The Court also stated:

> ...As a matter of policy, we do not treat the validity of most land use ordinance provisions as involving matters of constitutional dimension; that classification is confined to major questions of fundamental import.... We consider the basic importance of housing and local regulations restricting its availability to substantial segments of the population to fall within the latter category.

67 N.J. at 175.

*/ In addition, plaintiffs submit that this case involves a substantial question arising under the State Constitution, which would permit an appeal as of right. R. 2:2-1(a).

This case concerns the denial of that fundamental right. The mechanism by which that denial is effected is exclusion of lower income persons through local zoning regulations--exclusion not merely from a single municipality but from nearly all of Middlesex County. Thus, the case is unique because the injury to plaintiffs results from the aggregate or cumulative effect of the exclusionary policies of all the defendant municipalities.

The specific question before this Court is whether demarcation of the region is an essential element in the determination that a zoning ordinance is unconstitutionally exclusionary. The effect of the decision of the Appellate Division on this issue is to impose this new element on plaintiffs' burden of proof. Dispositive resolution of this issue, not previously addressed by this Court, is of great public importance.

The Decision Conflicts With Existing Case Law and Requires This Court's Supervision

As discussed earlier, the opinion of the Appellate Division in this case conflicts with prior decisions by this Court, specifically Mt. Laurel and Madison. In neither case did the trial court specifically or accurately demarcate the geographical boundaries of the region. Yet in both cases this Court sustained the trial court's determination that the zoning ordinance was unconstitutionally exclusionary. This Court should decide the instant appeal so that the conflict between the Appellate Division's ruling in this case and those of this Court in Mt. Laurel and Madison can be resolved.

The Interest of Justice Requires Certification

The Appellate Division's decision to reverse the trial court, without remand, will result in incalculable harm to plaintiffs and the class they represent. The injury derives from several cir-

cumstances peculiar to this case.

First, the Madison decision, upon which the appellate panel relied, was decided by this Court more than eight months after Judge Furman's decision in this case. Neither the parties, in presenting their proofs, nor the trial judge, in considering his decision, had the benefit of examining the Court's opinion in that case. The interests of justice require certification to clarify the law in this vital area of concern in the State, and to permit the parties and the trial court to proceed with full guidance from the Court.

Second, because this case is a class action and involves the whole of Middlesex County the adverse impact of the Appellate Division's decision will be enormous. Pursuant to that decision, the defendants' zoning ordinance, which Judge Furman determined to be unconstitutionally exclusionary, will be rendered immune from any further challenge by lower income persons. Further, the practical result will be that the municipalities in Middlesex County, one of the fastest growing counties in the state, will be allowed to maintain exclusionary zoning ordinances, while municipalities in other counties may be held judicially accountable for constitutional violations. The interests of justice require certification so that this unfortunate and inequitable result does not occur.

CONCLUSION

For the reasons set forth above, plaintiffs respectfully urge the Court to grant this Petition for Certification. Plaintiffs seek reversal of the decision of the Appellate Division insofar as the Court found an insufficient definition of region and overturned the trial court's findings that the zoning ordinances of the

defendant municipalities were exclusionary.

Should this Court determine that the Appellate Division's decision is correct and that definition of region is essential to proving that a zoning ordinance is unconstitutionally exclusionary, plaintiffs request that this Court remand the case to the trial court for further consideration in light of the opinion of this Court in Madison and the instant case.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I, Roger C. Rosenthal, attorney for plaintiffs in the instant case, hereby certify that plaintiffs' Petition for Certification presents a substantial question and is filed in good faith and not for purposes of delay.

SUPREME COURT OF NEW JERSEY

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,		
Plaintiffs,	)	Docket No. 16,492
v.	)	CIVIL ACTION
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al.,		
Defendants.		

CERTIFICATE OF SERVICE

I hereby certify that service of this Petition for Certification to the Superior Court, Appellate Division and Appendix was made by mailing the original and nine copies by Express Mail to the Clerk of the Supreme Court of New Jersey, and two copies of the Petition and Appendix by ordinary mail to counsel for the defendants listed below this 18th day of October, 1979.

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APPENDIX

TRIAL COURT OPINION

URBAN LEAGUE OF GREATER NEW BRUNSWICK, A NON-PROFIT CORPORATION OF THE STATE OF NEW JERSEY; CLEVELAND BENSON; JUDITH CHAMPION; LYDIA CRUZ; BARBARA TIPPETT; KENNETH TUSKEY ON THEIR OWN BEHALF AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS, v. THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET; TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY; MAYOR AND COUNCIL OF THE BOROUGH OF DUNELLEN; TOWNSHIP COMMITTEE OF THE TOWNSHIP OF EAST BRUNSWICK; TOWNSHIP COMMITTEE OF THE TOWNSHIP OF EDISON; MAYOR AND COUNCIL OF THE BOROUGH OF HELMETTA; MAYOR AND COUNCIL OF THE BOROUGH OF HIGHLAND PARK; MAYOR AND COUNCIL OF THE BOROUGH OF JAMESBURG; TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MADISON; MAYOR AND COUNCIL OF THE BOROUGH OF METUCHEN; MAYOR AND COUNCIL OF THE BOROUGH OF MIDDLESEX; MAYOR AND COUNCIL OF THE BOROUGH OF MILLTOWN; TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MONROE; TOWNSHIP COMMITTEE OF THE TOWNSHIP OF NORTH BRUNSWICK; TOWNSHIP COMMITTEE OF THE TOWNSHIP OF PISCATAWAY; TOWNSHIP COMMITTEE OF THE TOWNSHIP OF PLAINSBORO; MAYOR AND COUNCIL OF THE BOROUGH OF SAYREVILLE; MAYOR AND COUNCIL OF THE CITY OF SOUTH AMBOY; TOWNSHIP COMMITTEE OF THE TOWNSHIP OF SOUTH BRUNSWICK; MAYOR AND COUNCIL OF THE BOROUGH OF SOUTH PLAINFIELD; MAYOR AND COUNCIL OF THE BOROUGH OF SOUTH RIVER; MAYOR AND COUNCIL OF THE BOROUGH OF SPOTSWOOD; TOWNSHIP COMMITTEE OF THE TOWNSHIP OF WOODBRIDGE, DEFENDANTS AND THIRD-PARTY PLAINTIFFS, v. CITY OF NEW BRUNSWICK AND CITY OF PERTH AMBOY, THIRD-PARTY DEFENDANTS, AND NEW JERSEY LEAGUE OF WOMEN VOTERS AND MIDDLESEX COUNTY LEAGUE OF WOMEN VOTERS, INTERVENORS.

Superior Court of New Jersey
Chancery Division

Decided May 4, 1970.

SYNOPSIS

Individuals and nonprofit corporation brought action against communities in particular county challenging validity of their zoning ordinances on basis of their exclusion of low and moderate income housing units. The Superior Court, Chancery Division, Furman, J. S. C., held that plaintiffs had standing to assert state constitutional challenges: that 11 communities' zoning ordinances were invalid because they did not permit the communities to accept their fair share of the low and moderate income housing needed in the region; and that each of the municipalities would be required to rezone in order to permit it to accept a sufficient number of such units so that the total number of units available in the region would meet the projected need for such housing in the year 1985.

Order accordingly.

---

1. Zoning ⇨23

Individual plaintiffs as nonresidents of various communities lacked standing to urge federal constitutional and statutory infirmities in municipal zoning but they did have standing to pursue state constitutional objections based on failure of the communities to make provisions for their fair share of low and moderate income housing.

2. Zoning ⇨23

Civil rights organization, a nonprofit corporation, had standing to pursue state constitutional challenges to zoning ordinances of various communities based on allegations that the communities failed to make provisions for their fair share of low and moderate income housing.

3. Parties ⇨10

White person who could not find adequate low income housing in the county, black who could not find adequate moderate income housing in the county, black who was adequately housed in the city in which he lived but who could not find equivalent housing in nonsegregated neighborhood, and white who objected to racial and economic imbalance in the community in which he lived could maintain class action to challenge various zoning ordinances adopted by municipalities based on contention that the municipalities were not accepting their fair share of low and moderate income families. *R.* 4:32-1(a), (b)(3).

4. Civil rights ⇨13.13(3)

Although evidence showed that impact of low density zoning was most adverse to blacks and Hispanics who were disproportionately of low and moderate income, evidence was insufficient to show that there was deliberate or systematic exclusion of minorities by communities through adoption of their zoning ordinances. 42 *U. S. C. A.* §§ 1981, 1982; Civil Rights Act of 1968, § 801 et seq., 42 *U. S. C. A.* § 3601 et seq.

5. United States ⇨82

County which was a standard metropolitan statistical area, which had 20 of its 25 municipalities joining in a community development block grant application under terms of the Housing and Community Development Act, which had a county master plan, and which was within the sweep of suburbia was a "region" for purposes of determining if the various communities were affording opportunities for their fair share of low and moderate income housing. Housing and Community Development Act of 1974, § 101 et seq., 42 *U. S. C. A.* § 5301 et seq.

6. Zoning ⇨68

Community which had a population of over 7,000 in a square mile area, which had 42% low and moderate income households, which had less than 20 acres of vacant land, and which had no patently exclusionary provisions in its zoning ordinance was not unconstitutionally denying opportunity for its share of region's low and moderate income housing.

7. Municipal corporations ⇨600
Zoning ⇨101

Municipality is not exempt from constitutional standards of reasonableness in its zoning or from requirement that it accept a fair share of low and moderate income housing simply because it is not a developing community.

8. Municipal corporations ⇨600

Past exclusionary practices of two communities could not shield them from their obligation to meet fair share of regional housing needs for low and moderate income households.

9. Zoning ⇨11

When a municipality is zoned for industry and commerce for local tax benefit purposes, it must zone to permit adequate housing within the means of the employees involved in such uses.

10. Municipal corporations ⇨600

Eleven communities which provided ample vacant land for 2,600 or more units of low and moderate income housing at densities of five to ten units per acre were "developing municipalities" for purposes of New Jersey Supreme Court decision dealing with constitutional obligation of municipalities to accept their fair share of low and moderate income housing.

11. Zoning ⇨647

Evidence of acreage available for development for housing purposes in each of 11 communities, evidence of zoning restrictions in terms of lot size and density contained in ordinances of each of the 11 communities, evidence of overzoning for industrial purposes in each of the 11 communities, and evidence of the number of substandard housing units and units occupied by households requiring governmental housing subsidies in each of the 11 communities demonstrated that their zoning ordinances were constitutionally

invalid because they did not allow for each of the communities to accept its fair share of low and moderate income housing in the region.

12. Municipal corporations ⇨600

Absence of sewer utilities is not per se an exemption from requirement that community accept its fair share of low and moderate income housing units.

13. Zoning ⇨121

Eleven municipalities which were found to have zoning ordinances which were invalid because they operated to exclude low and moderate income housing from the community would be directed to rezone in order to permit each community to accept sufficient number of low and moderate income housing units to provide, along with such units available in other communities in the region, for the needs of the region as projected to exist in 1955; approvals of multifamily projects could impose mandatory minimums of low and moderate income units with density incentives being set if the communities so desired.

Ms. Marilyn J. Morhenser and Mr. Martin E. Sloane, of the New York bar, admitted *pro hac vice*, and Mr. Daniel A. Searing, of the Maryland bar, admitted *pro hac vice*, for plaintiffs (Messrs. Baumgart and Ben-Asher, attorneys).

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Mr. William C. Moran, Jr. for defendant Township Committee of the Township of Cranbury.

Mr. Dennis J. Cummins, Jr. for defendant Mayor and Council of the Borough of Dunellen.

Mr. Bertram E. Busch for defendant Township Committee of the Township of East Brunswick.

Mr. Roland A. Winter for defendant Township Committee of the Township of Edison.

Mr. Richard F. Plechner for defendant Mayor and Council of the Borough of Helmetta.

Mr. Lawrence Lerner for defendant Mayor and Council of the Borough of Highland Park.

Mr. Guido J. Brigiani for defendants Mayor and Council of the Borough of Jamesburg and Mayor and Council of the Borough of Spotswood.

Mr. Louis J. Alfonso for defendant Township Committee of the Township of Madison (Old Bridge).

Mr. Martin A. Spritzer for defendant Mayor and Council Borough of Metuchen.

Mr. Edward J. Johnson, Jr. for defendant Mayor and Council of the Borough of Middlesex.

Mr. Charles V. Bowram for defendant Mayor and Council of the Borough of Milltown.

Mr. Thomas R. Farino, Jr. for defendant Township Committee of the Township of Monroe.

Mr. Joseph H. Burns and Mr. Leslie S. Lefkowitz for defendant Township Committee of the Township of North Brunswick.

Mr. Daniel S. Bernstein for defendant Township Committee of the Township of Piscataway.

Mr. Joseph L. Stonaker for defendant Township Committee of the Township of Plainsboro.

Mr. Alan J. Karcher for defendant Mayor and Coun of the Borough of Sayreville.

Mr. John J. Vail for defendant Mayor and Council of t City of South Amboy.

Mr. Andre W. Gruler for defendant Township Committe of the Township of South Brunswick.

Mr. Sanford E. Chernin for defendant Mayor and Counci of the Borough of South Plainfield.

Mr. Robert C. Rafano and Mr. Gary M. Schwartz for defendant Mayor and Council of the Borough of South River.

Mr. Arthur W. Burgess and Mr. Barry H. Shapiro for defendant Township Committee of the Township of Woodbridge.

Mr. Gilbert L. Nelson for third-party defendant City of New Brunswick.

Mr. Frank J. Jess for third-party defendant City of Perth Amboy.

Mr. William J. O'Shaughnessy for intervenors (Messrs. Clapp & Eisenberg, attorneys).

FURMAN, J. S. C. Plaintiffs attack the zoning ordinance of 23 of the 25 municipalities of Middlesex County as unconstitutionally exclusionary and discriminatory. Third-party complaints against the cities of New Brunswick and Perth Amboy were dismissed after trial. The remedy sought by plaintiffs is an allocation to each municipality of its fair share of low and moderate-income housing to meet the county-wide need. Plaintiffs rely on *So. Burl. Cty. N.A.A.C.P. v. Mt. Laurel Tp.*, 67 *N. J.* 151, *cert.* den. 423 *U. S.* 808 96

S. Ct. 18, 46 *L. Ed.* 2d 28 (1975), which imposes on a developing municipality the obligation to provide by land use regulations for its fair share of the present and prospective regional need for low and moderate-income housing.

[1] Plaintiffs comprise an organization and five persons who sue individually and as representatives of others similarly situated. The standing of all plaintiffs is challenged. Under *Warth v. Seldin*, 422 *U. S.* 490, 95 *S. Ct.* 2197, 45 *L. Ed.* 2d 343 (1975), the individual plaintiffs as nonresidents lack standing to urge federal constitutional and statutory infirmities in municipal zoning. But their standing as nonresidents to pursue state constitutional objections is sustained in *Mt. Laurel, supra* 67 *N. J.* at 159. The standing of the three organizations which were plaintiffs in *Mt. Laurel* was not at issue and not passed on in Justice Hall's opinion.

[2] Plaintiff Urban League of Greater New Brunswick seeks housing for its members and others, mostly blacks and Hispanics, throughout the county and elsewhere nearby, encountering rebuffs and delays. Under the liberal criteria for standing which prevail in this State, standing must be accorded to plaintiff Urban League. *Crescent Pk. Tenants Ass'n v. Realty Eq. Corp. of N. Y.*, 58 *N. J.* 98 (1971).

[3] No monetary or other specific recovery and no counsel fee for maintaining class actions are sought. Unquestionably, some others are similarly situated to plaintiff Champion, a white, who cannot find adequate low-income housing in the county for her family of three; plaintiff Benson, a black, who cannot find adequate moderate-income housing in the county for his family of 11; plaintiff Tippett, a black, whose family of five is adequately housed in New Brunswick but who cannot find equivalent housing in an unsegregated neighborhood, and plaintiff Tuskey, a white, who objects to the racial and economic imbalance in South Brunswick, the predominately white municipality in which he resides with his family, including two children attending public school. The class actions are maintainable under *R.* 4:32-1(a) and (b) (3).

[4] At the close of plaintiffs' proofs the court dismissed the cause of action for wilful racial discrimination. The impact of low-density zoning is most adverse to blacks and Hispanics, who are disproportionately of low and moderate-income. But no credible evidence of deliberate or systematic exclusion of minorities was before the court. That dismissal must result in the dismissal also of the specific count for violation of Federal Civil Rights Acts. 42 *U. S. C. A.* §§ 1981, 1982 and 3601 *et seq.*

The challenge to the exclusionary aspects of defendants' zoning ordinances remains. All three branches of government have recognized overwhelming needs for low and moderate-income housing in the State as a whole.

In Executive Order No. 35, dated April 2, 1976, Governor Byrne stated that

> * * * there exists a serious shortage of adequate, safe and sanitary housing accommodations for many households at rents and prices they can reasonably afford, especially for low and moderate income households, newly formed households, senior citizens, and households with children.

The Legislature in the preamble to the New Jersey Housing Assistance Bond Act of 1975, *L.* 1975, *c.* 207, § 2(a), made a finding:

> Despite the existence of numerous Federal programs designed to provide housing for senior citizens and families of low and moderate income, construction and rehabilitation of such housing units has not proceeded at a pace sufficient to provide for the housing need of the State.

In *Mt. Laurel* Justice Hall concluded that

> There is not the slightest doubt that New Jersey has been, and continues to be, faced with a desperate need for housing, especially of decent living accommodations economically suitable for low and moderate income families. [67 *N. J.* at 176]

Other recent legislation dealing with the housing shortage is set out in *Mt. Laurel* at 179.

In Middlesex County the shortage of low and moderate-income housing is critical. From 1960 to 1970 the number of new jobs in the county increased by 2.2 times the number of new housing units, and the number of employees in the county residing outside the county increased by 291%. In 1960 the total vacant land in the county was zoned 24.9% for industry, 22.7% for one-acre or larger single-family housing, 21.5% for less than one-quarter acre single-family housing and 2.1% for multi-family housing. Ten years later the zoning countywide was markedly more exclusionary: 41.7% for industry, 38.7% for one-acre or larger single-family housing, 4.9% for less than one-quarter acre single-family housing, and .5% for multi-family housing.

The pattern of dwindling low and moderate housing opportunities has continued in the county since 1970. Minimal modest lot single-family housing has been built. Housing congestion is worsening in the urban ghettoes. New mobile homes are prohibited in all municipalities. Thirteen municipalities have enacted rent control ordinances in response to the multi-family housing shortage.[1] Vacancy rates are low. Despite overzoning for industry, new industry is reluctant to settle in the county because of the shortage of housing for its workers. Experts for various defendants acknowledged a substantial market and a pressing need for new low and moderate housing.

The issue whether Middlesex County is a housing region is of significance because of the adoption of the term "region" in *Mt. Laurel*. Housing which must be afforded by a developing municipality is defined as its fair share of the present and prospective regional need. In *Oakwood at Madi-*

[1]East Brunswick, Edison, Highland Park, Metuchen, Middlesex, New Brunswick, North Brunswick, Old Bridge, Perth Amboy, Piscataway, Sayreville, South Brunswick, Woodbridge. Municipal police power to enact rent control ordinances was upheld in *Inganamort v. Fort Lee*, 62 *N. J.* 521 (1973), because of the critical housing need.

son, Inc. v. Madison Tp., 117 *N. J. Super.* 11(Law Div. 1971), certif. granted 62 *N. J.* 185 (1972), on remand 128 *N. J. Super.* 438 (Law Div. 1974), this court struck down a zoning ordinance which failed to provide for a fair proportion of the housing needs of the municipality's own population and of the region, holding that it was in derogation of the general welfare encompassing housing needs and therefore unconstitutional. Justice Hall noted in *Mt. Laurel*

> The composition of the applicable 'region' will necessarily vary from situation to situation and probably no hard and fast rule will serve to furnish the answer in every case. [67 *N. J.* at 189]

Middlesex County is part of the New York metropolitan region. Plainsboro and Cranbury and portions of South Brunswick and Monroe to the southwest of the county are in some measure also part of the Philadelphia metropolitan region. Those areas look predominately towards Trenton, Princeton and Hightstown in Mercer County for local shopping and services. In the north of the county South Plainfield, Dunellen and Middlesex and portions of Piscataway and Edison look predominately towards Plainfield in Union County for local shopping and services. The balance of the county is oriented within the county, towards New Brunswick, Perth Amboy or elsewhere, for local shopping and services.

[5] Regions are fuzzy at the borders. Middlesex County is a Standard Metropolitan Statistical Area as fixed by the United States Office of Management and Budget. Such an area is specified as an integrated economic and social unit with a large population nucleus. Twenty of the 25 municipalities joined in a Community Development Block Grant application as an "urban county" under the regulations of the Housing and Community Development Act of 1974, 42 *U. S. C. A.* § 5301 *et seq.*[2] A county master plan and a

[2]Edison, New Brunswick, Perth Amboy, Sayreville and Woodbridge submitted their separate applications as "entitlement municipalities."

wealth of applicable statistics are available through the county planning board. Some one employed in any municipality of the county may seek housing in any other municipality, and someone residing in any municipality may seek employment in any other municipality. Residence within walking distance of the place of employment, or within the same municipality, is no longer a desideratum. Nor is the availability of public transportation a major factor. The county is criss-crossed by arterial highways, including the New Jersey Turnpike and the Garden State Parkway. Mobility by automobile is the rule. A large proportion of even the low-income wage earners within the county own automobiles and many of those travel regularly 20 miles or more to their places of employment. The entire county is within the sweep of suburbia. Its designation as a region for the purpose of this litigation, within larger metropolitan regions, is sustained.

[6] In compliance with *Mt. Laurel* plaintiffs undertook to establish by a prima facie showing that each of the 23 defendant municipalities' zoning ordinances was constitutionally invalid because of failure to provide for a fair share of the low and moderate-income housing needs of the region. That burden was met as to 11 municipalities, as will be analyzed *infra*. Dunellen was granted an outright dismissal. With a population of over 7,000 in a square mile area and about 42% low and moderate-income households, Dunellen has less than 20 acres of vacant land, mostly unsuitable for housing, and no patently exclusionary provisions in its zoning ordinance.

In addition, 11 municipalities -- Carteret, Helmetta, Highland Park, Jamesburg, Metuchen, Middlesex, Milltown, South Amboy, South River, Spotswood and Woodbridge -- were granted dismissals conditional upon adoption of amendments to their zoning ordinances which are agreed to by their respective attorneys, accepted by plaintiffs and approved by the court. These amendments include the following: Deletion of limitations on the number of bedrooms or

of rooms in multi-family housing;[3] deletion of restrictive special exception procedures for multi-family housing and provision for it as an allowable use;[4] reduction of excessive parking space requirements in multi-family housing;[5] reduction of excessive minimum floor area requirements in multi-family or single-family housing or both;[6] reduction of excessive minimum lot sizes for multi-family or single-family housing or both,[7] increase of maximum density of multi-family housing to 15 units per acre,[8] increase of maximum height of multi-family housing to 2½ stories or higher;[9] deletion of a multi-family housing ceiling of 15% of total housing units within a municipality;[10] rezoning from industry to multi-family residential[11] and from single-family to multi-family residential.[12] A number of these agreed revisions have been enacted.

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[3]Carteret, Highland Park, Middlesex, South Amboy, Spotswood, Woodbridge. *Mt. Laurel* 67 *N. J.* at 182–183.

[4]Jamesburg, Middlesex, Milltown, South Amboy, South River, Woodbridge.

[5]Jamesburg, Milltown. Reductions to 1.5 parking spaces minimum per unit were agreed to.

[6]Jamesburg, Metuchen, Milltown, South Amboy, Spotswood, Woodbridge. Reductions to less than 1,000 square feet minimum per single-family unit, to less than 700 square feet minimum per one bedroom multi-family unit, and to less than 550 square feet minimum per efficiency unit, were agreed to.

[7]Carteret, Highland Park, Middlesex, South River, Spotswood, Woodbridge. Reductions to less than 10,000 square feet minimum single-family lot and to less than three-acre minimum multi-family lot were agreed to.

[8]South Amboy.

[9]South Amboy, South River.

[10]South River.

[11]South Amboy, Spotswood.

[12]Helmetta, Milltown, South Amboy, South River, Spotswood, Woodbridge.

[7] The 11 municipalities which were dismissed conditionally from the litigation are substantially built up without significant vacant acreage suitable for housing, except Woodbridge with about 800 acres, Spotswood with about 200 acres and Jamesburg, South Amboy and South River with about 100 acres each. In view of the consent dismissals no issue is before the court whether these 11 municipalities are "developing municipalities" in the sense of that term in Mt. Laurel. Incontrovertibly, a fair share allocation of a substantial number of new housing units to meet regional needs would be nugatory in a municipality with minimal vacant acreage. But a municipality is not exempt from the constitutional standards of reasonableness in its zoning because it is not "developing" within *Mt. Laurel*.

[8] Exemption from *Mt. Laurel* was pressed by Cranbury and Plainsboro on another ground. *Mt. Laurel* (67 *N. J.* at 160) cites as one of the characteristics of a developing municipality that it has undergone a great population increase since World War II. These two townships have not, in contrast to the explosive growth countywide. But their relatively static population is attributable in large measure to restrictive zoning. Past exclusionary practices cannot shield them from an obligation to meet their fair share of regional housing needs.

Eleven municipalities were not dismissed outright or conditionally and, as prescribed in *Mt. Laurel*, assumed the "heavy burden" of establishing peculiar circumstances justifying their failure to afford the opportunity for low and moderate income housing to the extent of their respective fair shares. These 11 municipalities comprise seven townships south of the Raritan River (Cranbury, East Brunswick, Old Bridge (formerly Madison), Monroe, North Brunswick, Plainsboro and South Brunswick), two townships north of the Raritan River (Edison and Piscataway), and two boroughs, Sayreville south and South Plainfield north of the Raritan River.

The exclusionary zoning practices in some or all of these 11 municipalities, compounded in effect because of the proximity of several to each other, embrace overzoning for industry and low-density residential housing, underzoning for high-density single-family and multi-family residential housing, prohibition of multi-family housing and mobile homes, bedroom and density restrictions on multi-family housing excluding couples with two or more children, and floor area and other restrictions on multi-family housing forcing up construction costs.

Prior to a discussion seriatim of the 11 zoning ordinances, population, income, employment and vacant acreage tables are appropriate.

East Brunswick, Edison, Monroe, North Brunswick, Old Bridge, Piscataway, Sayreville, South Brunswick and South Plainfield underwent a population upsurge since 1950 even beyond the 120% gain in the county. Only Cranbury and Plainsboro trailed perceptibly behind.

	POPULATION			INCREASE
	1950	*1960*	*1970*	*1950-1970*
Cranbury	1,707	2,001	2,253	25%
East Brunswick	5,699	19,965	31,106	509%
Edison	18,318	44,799	67,120	310%
Monroe	4,092	6,931	9,133	121%
North Brunswick	6,450	10,999	16,691	159%
Old Bridge	7,366	22,772	48,715	561%
Piscataway	10,180	19,890	36,418	258%
Plainsboro	1,112	1,171	1,613	45%
Sayreville	10,338	22,553	32,508	214%
South Brunswick	4,601	10,278	14,058	251%
South Plainfield	8,003	17,879	21,142	164%
Middlesex County	264,872	433,856	583,813	120%

Based on the 1970 census, low income in the following table is figured as up to $7,000 a year and moderate income up to $10,000. Those limits approximate the bottom 20% and the next 20% in the State as a whole, and compare closely in Middlesex County with the Federal Department of Housing and Urban Development standards of low income as up

to 50% of median income and moderate income as 50 to 80% of median income. Among the 11 municipalities only Piscataway, with Rutgers University married student housing, and Plainsboro, with farm labor housing, exceed the county percentage of low and moderate-income families. Most are within 15% of the county percentage. Edison and South Plainfield are within 25%. Only East Brunswick may be characterized as an elite community. In contrast, New Brunswick and Perth Amboy both had 51% low and moderate income population. Jamesburg 49% and Helmetta 48%.

INCOME BY FAMILIES IN 1970

	% Low Income	% Moderate Income
Cranbury	20	14
East Brunswick	7	11
Edison	11	15
Monroe	12	21
North Brunswick	12	18
Old Bridge	12	19.3
Piscataway	14	21.5
Plainsboro	23	20.5
Sayreville	10	20
South Brunswick	12.5	17
South Plainfield	11	15
Middlesex County	15	19

[9] Industrial employees in the following table are defined as employees in manufacturing, wholesale, transportation, utilities and construction. The projections for the year 2000 are based upon county planning board estimates, as modified upward in Edison, Monroe and Old Bridge according to fact findings by the court. In eight of the 11 municipalities there are glaring deficiencies in low and moderate-income housing, as measured by low and moderate-income population, for the industrial employees within that municipality. In East Brunswick the deficiency is less but over 40%. Only Monroe and Old Bridge apparently offer adequate housing opportunities for their blue collar workers. By the year 2000 the deficiencies in low and moderate income housing for industrial employees within each municipality would be of disastrous

proportions under present zoning. See Justice Hall's statement in *Mt. Laurel*:

> Certainly when a municipality zones for industry and commerce for local tax purposes, it without question must zone to permit adequate housing within the means of the employees involved in such uses. [67 *N. J.* at 187]

It is pertinent to note that at present an estimated 75,000 residents of the county are employed outside the county, as compared to an estimated 55,000 residents elsewhere who are employed within the county.

INDUSTRIAL ACREAGE AND EMPLOYEES

	1967		2000 projected	
	acres in use	*employees*	*acres in use*	*employees*
Cranbury	185	1,362	678	7,876
East Brunswick	378	2,176	1,377	11,877
Edison	1,789	15,823	3,950	39,589
Monroe	266	460	1,860	15,033
North Brunswick	1,231	11,739	2,347	23,294
Old Bridge	1,685	491	2,685	9,824
Piscataway	346	6,893	1,358	16,746
Plainsboro	229	433	557	4,253
Sayreville	967	8,786	2,691	20,670
South Brunswick	718	3,586	1,872	18,695
South Plainfield	509	3,767	1,187	11,250

[10, 11] The vacant acreage statistics in the following table are compiled from answers to interrogatories by the respective municipalities, data of the State Department of Community Affairs and relevant testimony. Gross vacant acreage suitable for housing excludes identified environmentally critical land, that is, short-term flood plains, aquifer outcrops and swamps essential to water resources, also grades of 12% or steeper and proposed park land. Net vacant acreage also excludes vacant land reasonably zoned for industry and commerce and all farmland in present use. Manifestly there is ample vacant land in all 11 municipalities suitable for 2,000 or more units of low and moderate-income housing at densities of five to ten units an acre. The major land re-

source of the county in the more distant future must rest in Monroe, Old Bridge and South Brunswick. With such significant open acreages all 11 municipalities fit within the *Mt. Laurel* criterion of "developing municipalities".

	TOTAL ACREAGE	VACANT ACREAGE SUITABLE FOR HOUSING	
		Gross	*Net*
Cranbury	8,614	6,091	1,709
East Brunswick	14,342	3,521	1,600
Edison	27,289	5,756	2,200
Monroe	26,041	21,819	11,500
North Brunswick	7,628	2,717	1,600
Old Bridge	25,126	15,669	13,500
Piscataway	12,288	2,697	1,215
Plainsboro	7,680	5,437	1,150
Sayreville	10,560	4,083	1,800
South Brunswick	28,788	23,470	17,000
South Plainfield	5,344	1,542	740

Cranbury is an historic village in the midst of farmland. In active farm use are 4,468 acres or 52% of its total area. An aquifer underlies much of it. The Upper Millstone River on its southerly and westerly borders is dangerously polluted. Meadowland along the river is designated as regional open space in the county master plan of 1970. Two major highways bisect Cranbury. Its residents who are employed outside Cranbury travel about half to the north and east and half to the south and west. It has 44 substandard housing units[13] and 99 occupied by households requiring a governmental housing subsidy.

Cranbury's zoning ordinance permits no new multi-family housing, except conversions to two family. Minimum lot size of 15,000 square feet are permitted only in the substantially built-up village. Elsewhere the minimum lot size is 40,000 square feet. The township is overzoned for industry by over 2,000 acres, and over 500% of projected demand. A zoning amendment is under study to permit multi-family housing.

13) Defined as deteriorated, dilapidated, overcrowded, without plumbing or without kitchen facilities.

with some low and moderate-income units, to the east of the village along Brainerd Lake. A sewer system would tie in to the Middlesex County Sewerage Authority.

Cranbury's present zoning ordinance falls short of the *Mt. Laurel* standard and must be struck down in view of available suitable acreage adjoining the village on which low and moderate-income housing may be built without impairing the established residential character of the village or interfering with present farm uses.

East Brunswick is a relatively low-density residential municipality centrally located and bisected by major highways. It has established middle and high-income neighborhoods. Less than 1,000 acres is farmland in use. Much of its undeveloped land is environmentally sensitive: aquifer outcrops, tidal marshes along the Raritan and South Rivers, other flood plains along several brooks, and steep hilly terrain. Sewage disposal and drainage are problems because of the high water table and clay soil in many areas. The northernmost fringes of the pine barrens are in the township. It has 244 substandard housing units and 348 occupied by households requiring a governmental housing subsidy.

Its zoning ordinance provides preponderately for one-acre and half-acre single-family housing wtih cluster options. Minimum floor areas of 1,500 square feet and minimum frontages exceeding 100 feet in most zones substantially exclude low and moderate income housing. Virtually no vacant land is available for single-family housing on 10,000 square foot lots or for multi-family housing. Maximum densities of 12 units an acre and other restrictions on multi-family housing drive up construction costs. The township is overzoned for industry by over 1,100 acres, and over 250% of projected demand. A master plan revision is being worked on.

[12] East Brunswick's zoning ordinance must be held invalid under *Mt. Laurel*. Absence of sewer utilities is not

per se an exemption from *Mt. Laurel*. As stated by Justice Hall (67 *N. J.* at 186), even in soil with a permeability problem "the township could require [sewer and water utilities] as improvements by developers or install them under the special assessment or other appropriate statutory procedure."

Edison is a hub of highway, rail and deep water transportation. It has 520 substandard housing units and 1,879 occupied by households requiring a governmental housing subsidy. As noted *supra*, its low and moderate-income population is about 25% below that of the county, and it falls markedly short of providing low and moderate-income housing opportunities for its more than 15,000 industrial workers.

Its zoning ordinance authorizes diversity of housing but only 5% of its vacant land is zoned for multi-family housing, including 10 acres for high-rise apartments, and only 5% for single-family housing on 7,500 square foot lots. No other residential zone offers a realistic possibility, even with cluster options, for low and moderate-income housing because of lot size, floor area and frontage restrictions. The township is overzoned for industry by about 500 acres. Several housing projects are under way with governmental subsidies. The township is the subject of a consent judgment of the United States District Court to participate in various programs administered by the Department of Housing and Urban Development for new housing and rehabilitation of substandard housing and for sewage and other improvements.

Edison's zoning ordinance likewise must be struck down under *Mt. Laurel*, chiefly because of maldistribution of vacant land into low-density rather than high density residential uses, and to a lesser extent because of maldistribution of vacant land into industrial use.

Monroe has the largest farmland acreage in the county, although less proportionately than Cranbury and Plainsboro. Four water courses with adjoining flood plains flow

through it. The water table is high because of acquifers. Much of the soil is relatively impermeable. Without much industry locally, there is nevertheless ready access by highway to nearby industry and other places of employment. Monroe has 210 substandard housing units and 195 occupied by households requiring a governmental housing subsidy.

Monroe's zoning ordinance prohibits any multi-family housing except in planned retirement communities, requiring various amenities, on lots of 400 acres or more. The vacant acreage exceeding 20,000 acres is virtually preempted by industrial and rural residential zones. In the latter the restrictions, including 30,000 square foot lot sizes, inhibit low and moderate-income housing. The township is overzoned for industry by over 5,000 acres and over 400%.

The township's present zoning ordinance is palpably deficient under *Mt. Laurel*. Its own planning expert conceded a need for multi-family residential zoning with densities and other provisions compatible with low and moderate-income housing opportunities. Likewise, there is a glaring maldistribution into industrial and low-density residential uses rather than high-density residential uses.

North Brunswick is highly industrialized on major highway and rail routes. It has 99 substandard housing units and 473 occupied by households requiring a governmental housing subsidy.

Its zoning ordinance restricts most of the vacant land suitable for housing to single-family use on lots of 15,000 square feet or more, with frontages of 120 feet or more and floor areas of 1,200 square feet or more, and to multi-family use on five-acre minimum lots with maximum densities of only ten units an acre, or seven units an acre in Planned Unit Developments, and bedroom, parking and other restrictions substantially foreclosing low and moderate-income housing opportunities. The township is overzoned for industry by nearly 1,000 acres and 200%.

North Brunswick's zoning ordinance is held invalid under *Mt. Laurel* for reasons paralleling those applicable to Edison's ordinance.

Old Bridge's zoning ordinance was struck down by this court in *Oakwood at Madison, supra*. The two previous trial records were stipulated. Identical conclusions are reached, with the additional factual determinations that Old Bridge is overzoned for industry beyond reasonable projections by over 3,000 acres and over 400% and that it has 489 substandard housing units and 1,271 occupied by households requiring a governmental housing subsidy.

Piscataway is a sprawling township on the north bank of the Raritan River, reaching towards Plainfield and Bound Brook in Somerset County to the north and west and towards New Brunswick to the east. It has substantial industry. Its housing stock affords its fair share of present low and moderate-income units. It has 324 substandard housing units and 1,187 occupied by households requiring a governmental housing subsidy.

Piscataway's zoning ordinance inhibits appreciable further low and moderate-income housing opportunities. The township is not overzoned for industry, but 80% of its vacant residentially zoned land is zoned for single-family housing on half-acre minimum lots with a 20% cluster option, and only between 1 and 2% is zoned for multi-family housing. Various restrictions force up construction costs and discourage two or three-bedroom multi-family units: five-acre minimum lot size, maximum density of 15 bedrooms an acre, minimum storage area of 160 square feet a unit and minimum floor areas of 700 square feet in one-bedroom apartments and 900 square feet in two-bedroom apartments. A zoning revision is under study to rezone 300 acres or more for Planned Residential Developments as an alternative to single-family housing, with mandatory minimums of low and moderate-income units.

Prior to such a revision, along with elimination of bedroom and other restrictions on multi-family housing, Piscataway's zoning ordinance must be held unconstitutional under *Mt. Laurel* as not providing adequately for prospective regional housing needs.

Plainsboro has over 50% of its total area in use as farmland. Its farms average over 300 acres. Other than wetlands and flood plains along several water courses, its soil is prime for agriculture and favorable for housing. It has 26 substandard housing units and 81 occupied by households requiring a governmental housing subsidy.

Plainsboro's ordinance zones most vacant land for industry, for single-family housing on 35,250 square foot minimum lots with 200-foot minimum frontages, subject to cluster options of 15,000 square foot minimum lots, and for Planned Community and Planned Multi-Use Developments. Bedroom restrictions on multi-family housing were recently deleted. Other exclusionary restrictions on multi-family housing remain in effect. The township is overzoned for industry by about 2,000 acres and 700%. A 600-acre Planned Community Development providing significant low and moderate-income housing is under construction. Princeton University is planning a research center with multi-family housing units, including at least 20% low and moderate-income, between Lake Carnegie and U. S. Route 1.

Plainsboro's zoning ordinance, as constituted, is deficient under *Mt. Laurel* in failing to afford affirmatively its fair share of prospective regional housing needs.

Sayreville is a heavily industrialized borough surrounded on three sides by tidewater, with a deep water channel on the Raritan River. Much of its vacant acreage is abandoned sand pits. It has 167 sub-standard housing units and 671 occupied by households requiring a governmental housing subsidy.

Its zoning ordinance provides cluster and townhouse options in single-family residential zones. Planned Unit Developments are allowable uses in industrial zones. Minimum lot sizes for Planned Unit Developments are excessive — 100 acres under one option and 250 acres under the alterna-

tive — as are the requirements of 10% of total area in commercial use and 25% in industrial use. A density restriction under 15 units an acre, minimum lot size of five acres and excessive minimum floor areas curtail low and moderate-income housing in garden apartments. The borough is overzoned for industry apart from the Planned Unit Development alternatives. Major townhouse, garden apartment and senior citizen housing projects, which would provide over 600 low and moderate-income units, are under construction, approved or under review.

Sayreville's zoning ordinance is held invalid under *Mt. Laurel*. Its fair share allocation as determined *infra* should be attainable with relatively minor revisions.

South Brunswick is a sprawling township in the path of development both from New York and Philadelphia. Major highways and public transportation by railroad and bus are available. Several thousand acres of vacant land zoned for single-family housing on one, three and five-acre minimum lots are abandoned farmland. Aquifers underlie much of the township. Swamps, flood plains and aquifer outcrops rule out housing over extensive sections. Protection of aquifer recharge areas may be accomplished by retention ponds in medium and high-density residential zones, as well as industrial zones. An expert for the township conceded a population capacity of at least 100,000 without endangering environmentally sensitive land. Water and sewer utilities are lacking in much of the township. Such infrastructure is feasible. Development may fan out from the four scattered villages. The township has 149 sub-standard housing units and 284 occupied by households requiring a governmental housing subsidy.

Amendments to South Brunswick's zoning ordinance in recent years have lessened its exclusionary impact. Mandatory minimums of 3% low-income and 5% moderate-income units have been set in Planned Residential Developments—nevertheless, less than the county's and the township's own proportions of low and moderate-income households. The

township is overzoned for single-family housing on lots of one acre or more with frontages of 120 feet or more, and for industry by over 7,000 acres and over 700%. No multi-family housing is permitted outside Planned Residential Developments. One such development under construction near Dayton and others proposed or under review would augment low and moderate-income housing stock.

South Brunswick's zoning ordinance remains invalidly exclusionary under *Mt. Laurel* and must be struck down.

South Plainfield has convenient access to other municipalities of the county via Federal Interstate Highway 287. It has railroad freight transportation. Since World War II the borough has experienced upsurges in both population and industry. Housing development on its remaining open acreage which is not swamp or flood plain may be impeded by high costs of sewer construction through shale. The borough has 173 substandard housing units and 303 occupied by households requiring a governmental housing subsidy.

South Plainfield's zoning ordinance prohibits multi-family housing except two-family housing by conversion in any residential zone and in business zones. Most of its vacant acreage zoned for single-family housing is subject to excessive minimum lot size and minimum floor area restrictions. The borough is overzoned for industry by about 400 acres. Its zoning falls palpably short of meeting the housing needs of its industrial employees. Applying *Mt. Laurel*, South Plainfield's ordinance is held unconstitutional because of failure to provide for a fair share of its own and the county's low and moderate-income housing needs.

[13] The final issue is the remedy. The zoning ordinances of 11 defendant municipalities have been held unconstitutional. The 11 municipalities have been determined to be part of a region comprising Middlesex County for the purpose of this litigation. The remaining determination is the fair share allocation of low and moderate-income housing to each of the 11 municipalities.

A factual finding must therefore be made as to the county-wide low and moderate-income housing need projected to 1985. New units will be required to replace present substandard housing, for most of those filling new jobs in the county, for increasing numbers of retired persons and for other increments to population. Against this total must be deducted rehabilitated units through governmental subsidies and otherwise, units "filtering through" as occupants move up to higher income housing and units projected to be built under present or revised zoning in New Brunswick, Perth Amboy and the 12 municipalities which were dismissed outright or conditionally from this litigation, in particular Woodbridge, Spotswood, Jamesburg, South Amboy and South River which have significant vacant acreages. Taking into account county planning board population and job growth projections to 1985, estimating one-third of new jobs as low and moderate-income, and a ratio, as at present, of 73% of low and moderate-income employees also residing within the county, the total additional low and moderate-income housing need in the county to 1985 is fixed at 18,697 units.

The initial fair share allocation must be to correct the present imbalance, that is, to bring each defendant municipality up to the county proportion of 15% low and 19% moderate-income population. The county proportion rather than the state proportion of 20% low and 29% moderate-income is determined upon. The historic trend of urban dispersal from New York and Philadelphia is that per capita incomes in counties are higher in inverse ratio to distance from the central city. The allocation to correct imbalance results in the following additional low and moderate-income housing units.

Cranbury	18
East Brunswick	1,316
Edison	1,297
Monroe	23
North Brunswick	180

Old Bridge	301
Piscataway	0
Plainsboro	0
Sayreville	328
South Brunswick	156
South Plainfield	416
	4,020

Subtracting 4,030 from the 18,697 low and moderate income housing units needed in the county to 1985, the balance is 14,667 or approximately 1,333 per municipality. There is no basis not to apportion these units equally. Each municipality has vacant suitable land far in excess of its fair share requirement without impairing the established residential character of neighborhoods. Land to be protected for environmental considerations has been subtracted from vacant acreage totals. No special factor, such as relative access to employment, justifies a deviation from an allocation of 1,333 low and moderate housing units, plus the allocation to correct imbalance, to each of the 11 municipalities.

Low and moderate-income housing units should be divided 15% low and 85% moderate. Low income is defined as up to 50% of median income in the county, and moderate income as 50 to 80% of median income, according to current data of the county planning board. Within each municipality there may be flexibility — for example, multi-family housing at densities of ten or more units an acre, multi-family housing encompassing a diversity of housing but with mandatory minimums of low and moderate-income units; mobile homes at densities of five to eight units an acre,[11] and single-family housing at densities of four or

[11] *Vickers v. Gloucester Tp. Comm.*, 37 *N. J.* 232 (1962), *cert. den.* 371 *U. S.* 233, 83 *S. Ct.* 326, 9 *L. Ed.* 2d 495 (1963), upheld the constitutionality of a zoning ordinance which prohibits mobile

more units an acre. A combination of these alternatives may be arrived at. Each municipality would receive credit for pending low and moderate income construction for which certificates of occupancy have not been granted as of the date of this judgment.

After the allocation to correct imbalance, Cranbury, East Brunswick, Edison, North Brunswick, Piscataway, Plainsboro, Sayreville and South Plainfield are ordered to rezone their respective net vacant acreage suitable for housing, as shown in the fourth table *supra*, 15% for low income and 10% for moderate income on the basis of 100% zoning for housing (which this judgment does not require). The housing units thus afforded should approximate the allocation of 1,333 units each. As to any municipality, if it appears that such rezoning would fall significantly short of the allocation of 1,333 units, plus the allocation to correct imbalance, application to modify this judgment may be brought.

Monroe, Old Bridge and South Brunswick, all with net vacant land suitable for housing exceeding 10,000 acres, are ordered to rezone to provide their respective allocations of 1,333 units, plus their respective allocations to correct imbalance, by any combination of multi-family, mobile home or single-family housing.

As stated by Justice Hall in *Mt. Laurel* (67 *N. J.* at 192), "Courts do not build housing * * *." In implementing this judgment the 11 municipalities charged with fair share allocations must do more than rezone not to exclude the possibility of low and moderate-income housing in the allocated amounts. Approvals of multi-family projects, including Planned Unit Developments, should impose mandatory minimums of low and moderate-income units. Density incentives may be set. Mobile homes offer a realistic alterna-

homes anywhere in a sprawling, largely undeveloped municipality. But *Vickers* is not a bar to zoning, otherwise reasonable, to allow mobile homes.

tive within the reach of moderate and even low-income households. Whether single-family housing is attainable for moderate-income households may hinge upon land and construction costs. The 11 municipalities should pursue and cooperate in available federal and state subsidy programs for new housing and rehabilitation of substandard housing, although it is beyond the issues in this litigation to order the expenditure of municipal funds or the allowance of tax abatements. See *Hills v. Gautreaux*, — *U. S.* ———, 96 *S. Ct.* 1538, 47 *L. Ed.* 2d ——— (1976), holding that a federal district court has the authority to order the Department of Housing and Urban Development to undertake a regional plan for low-income and integrated housing to remedy housing discrimination fostered by H.U.D. practices in a central city, with the consent of suburban municipalities.

Judgment in accordance herewith to be effective after 90 days. Jurisdiction is retained.

OPINION OF APPELLATE DIVISION

OPINION OF APPELLATE DIVISION

NOT FOR PUBLICATION WITHOUT THE APPROVAL
OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-4681-75; 4683-75; 4685-75; 4720-75;
A-4721-75; 4722-75; 4759-75 & A-33-76

URBAN LEAGUE OF GREATER NEW BRUNSWICK, a nonprofit corporation of the State of New Jersey; CLEVELAND BENSON; FANNIE BOTTS; JUDITH CHAMPION; LYDIA CRUZ; BARBARA TIPPETT; KENNETH TUSKEY and JEAN WHITE, On their own behalf and on behalf of all others similarly situated,

Plaintiffs-Respondents-Cross-Appellants,

v.

THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET; TOWNSHIP COMMITTEE OF THE TOWNSHIP OF CRANBURY; MAYOR AND COUNCIL OF THE BOROUGH OF DUNELLEN; TOWNSHIP COMMITTEE OF THE TOWNSHIP OF EAST BRUNSWICK; TOWNSHIP COMMITTEE OF THE TOWNSHIP OF EDISON; MAYOR AND COUNCIL OF THE BOROUGH OF HELMETTA; MAYOR AND COUNCIL OF THE BOROUGH OF HIGHLAND PARK; MAYOR AND COUNCIL OF THE BOROUGH OF JAMESBURG; TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MADISON; MAYOR AND COUNCIL OF THE BOROUGH OF METUCHEN; MAYOR AND COUNCIL OF THE BOROUGH OF MIDDLESEX; MAYOR AND COUNCIL OF THE BOROUGH OF MILLTOWN; TOWNSHIP COMMITTEE OF THE TOWNSHIP OF MONROE; TOWNSHIP COMMITTEE OF THE TOWNSHIP OF NORTH BRUNSICK;

TOWNSHIP COMMITTEE OF THE TOWNSHIP OF PISCATAWAY; TOWNSHIP COMMITTEE OF THE TOWNSHIP OF PLAINSBORO; MAYOR AND COUNCIL OF THE BOROUGH OF SAYREVILLE; MAYOR AND COUNCIL OF THE CITY OF SOUTH AMBOY; TOWNSHIP COMMITTEE OF THE TOWNSHIP OF SOUTH BRUNSWICK; MAYOR AND COUNCIL OF THE BOROUGH OF SOUTH PLAINFIELD; MAYOR AND COUNCIL OF THE BOROUGH OF SOUTH RIVER; MAYOR AND COUNCIL OF THE BOROUGH OF SPOTSWOOD; TOWNSHIP COMMITTEE OF THE TOWNSHIP OF WOODBRIDGE,

Defendants-Appellants-Cross-Respondents.

Argued May 1, 1979 -- Decided SEP 11 1979

Before Judges Halpern, Ard and Antell.

On appeal from Superior Court of New Jersey, Chancery Division, Middlesex County, which opinion is reported at 142 N.J. Super. 11 (Ch. Div. 1976).

Mr. William C. Moran Jr. argued the cause for defendant Township of Cranbury (Messrs. Huff and Moran, attorneys).

Mr. Bertram E. Busch argued the cause for defendant Township Council of the Township of East Brunswick (Messrs. Busch & Busch, attorneys; Mr. Marc Morley Kane, on the brief).

Mr. Thomas R. Farino, Jr. argued the cause for defendant Township of Monroe.

Mr. Joseph H. Burns argued the cause for defendant Township of North Brunswick.

Mr. Daniel S. Bernstein argued the cause for defendant Township of Piscataway (Messrs.

Pa17

themselves and educational opportunities for their children in the defendant municipalities, but claim these are foreclosed by defendants' allegedly exclusionary land use regulations. Plaintiffs bring this action on their own behalf and on behalf of others similarly situated pursuant to R. 4:32.

The 23 defendants originally sued compose all the municipalities in Middlesex County except for Perth Amboy and New Brunswick. During the proceedings below the complaint was unconditionally dismissed with respect to defendant Dunellen, and consent judgments of conditional dismissal were entered with respect to 11 other defendants. Of the remainder only Old Bridge (formerly known as Madison Township) did not appeal. Appeals are now being pursued only by Cranbury, East Brunswick, Monroe, Piscataway, Plainsboro, Sayreville, South Brunswick and South Plainfield. Also before us is plaintiffs' cross-appeal from the court's denial of relief requested beyond what was granted.

Defendants first contend that the trial court erred in ruling that the individual plaintiffs had standing to urge State constitutional infirmities in defendants' zoning ordinances. In raising this issue defendants essentially contend that criteria for standing in these cases should be confined to those specifically applied in So. Burl. Cty. N.A.A.C.P. v. Tp. of Mt. Laurel, 67 N.J. 151 (1975) (hereinafter "Mt. Laurel"). They argue that because these plaintiffs, except for one, neither reside in the defendant munici-

Sachar, Bernstein, Rothberg, Sikora & Mongello, attorneys).

Mr. Joseph L. Stonaker argued the cause for defendant Township Committee of the Township of Plainsboro.

Mr. Barry C. Brechman argued the cause for defendant Township Committee of the Township of South Brunswick.

Mr. Sanford E. Chernin argued the cause for defendant Mayor & Council of the Borough of South Plainfield (Messrs. Chernin & Freeman, attorneys).

Ms. Marilyn J. Morheuser and Mr. Martin E. Sloane (Pro Hac Vice) argued the cause for all plaintiffs (Messrs. Baumgart and Ben-Asher, attorneys).

The opinion of the court was delivered by

ANTELL, J.A.D.

Defendants appeal from a judgment of the Chancery Division invalidating their zoning ordinances to the extent that they make inadequate provision for fair shares of low and moderate income regional housing needs and requiring them to rezone in accordance with specified allocations.

Plaintiff Urban League is a nonprofit corporation which works to improve the economic conditions of racial and ethnic minority groups and alleges a special interest in the need for low and moderate income housing. The individual plaintiffs are low and moderate income persons residing in Northeastern New Jersey. They seek housing and employment opportunities for

palities nor have actively sought housing there they fail to qualify.

But New Jersey rules of standing are characterized by great liberality. The test is whether plaintiffs have a sufficient stake in the outcome of the proceedings and whether their position is truly adverse to that of the defendants. Crescent Pk. Tenants Assoc. v. Realty Eq. Corp. of N.Y., 58 N.J. 98, 107-108 (1971). As recently explained by our Supreme Court in Home Builders League of South Jersey Inc. v. Township of Berlin, N.J. (1979) (Docket A-173/174-1978):

> These prerequisites are inherently fluid and "in cases involving substantial public interest *** 'but slight private interest, added to and harmonizing with the public interest' is sufficient to give standing Elizabeth Federal Savings & Loan Ass'n v. Howell, 24 N.J. 488, 499 (1957). See also In re Quinlan, 70 N.J. 10, 34-35, cert. den. 429 U.S. 922, 97 S. Ct. 319, 50 L.Ed. 2d 289 (1976). [Slip op. at pp. 5-6].

It added that the legislature has expressed the public interest in cases such as these by defining an "interested party" in the Municipal Land Use Law as "any person, whether residing within or without the municipality, whose right to use, acquire, or enjoy property is or may be affected by any action taken under this act *** ." N.J.S.A. 40:55D-4. Also see Urban League of Essex Cty. v. Tp. of Mahwah, 147 N.J. Super. 28 (App. Div.) certif. den. 74 N.J. 278 (1977).

The trial court correctly resolved the issue of standing with respect to State constitutional issues in plaintiffs' favor.

On the cross-appeal the individual plaintiffs assert that the trial court erred in denying them standing to argue violations of the 13th and 14th Amendments of the United States Constitution and violations of the Civil Rights Act of 1968, also known as the Fair Housing Act, 42 U.S.C.A. §3601, et seq. In ruling as it did the trial court applied principles formulated in Warth v. Seldin, 422 U.S. 490 (1975). For reasons which we explained in Urban League of Essex Cty. v. Tp. of Mahwah, supra at 33-34, this was error. New Jersey courts are not bound by federal rules of standing. The rights asserted by the individual plaintiff could only have arisen under 42 U.S.C.A. §3612(a) and, by the language of that statute, are enforceable "in appropriate State or local courts of general jurisdiction." See Urban League of Essex Cty. v. Tp. of Mahwah, supra.

Plaintiffs further claim that the trial court erred in dismissing the corporate plaintiff's complaint for racial discrimination under the foregoing federal statute. The reason given was that "no credible evidence of deliberate or systematic exclusion of minorities was before the court." Urb. League New Brns. v. Mayor & Coun. Carteret, 142 N.J. Super. 11, 19 (Ch. Div. 1976), certif. den. 74 N.J. 262 (1977)*. Without deciding whether the

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* An application was made to the Supreme Court for direct certification to the trial court.

evidence presented actually suffices to prove a violation, we conclude that the trial court erred in requiring proof of a discriminatory intent since this ruling is in conflict with controlling authorities. It is settled that in the interpretation of federal statutes courts of this state are bound by decisions of the federal courts. Southern Pacific Co. v. Wheaton Brass Works, 5 N.J. 594, 598 (1950), cert. den. 341 U.S. 904 (1951); Penbrook Hauling Co. v. Sovereign Const. Co., 128 N.J. Super. 179, 185 (Law Div. 1974), aff'd 136 N.J. Super. 395 (App. Div. 1975).

The pertinent principles are contained in Metropolitan, etc. v. Village of Arlington Heights, 558 F. 2d 1283 (7th Cir. 1977), cert. den. 434 U.S. 1025 (1978). There a landowner sued the defendant municipality to compel rezoning of plaintiff's property in order to permit construction of a federally financed low cost housing project. The suit was brought under the Fair Housing Act, 42 N.J.S.A. 3601, et seq. Section 3604(a) thereof prohibits discrimination "because of race *** " and the Circuit Court of Appeals rejected the "narrow view" that this language requires a showing of a discriminatory purpose. Instead, it took the "broad view" that "a party commits an action 'because of race' whenever the natural and foreseeable consequence of that act is to discriminate between races, regardless of his intent." At 1288. The court could not "agree that Congress in enacting the Fair Housing Act

intended to permit municipalities to systematically deprive minorities of housing opportunities simply because those municipalities act discreetly." Id. at 1290. The holding of that decision, which we deem applicable hereto, was stated in the following language:

> We therefore hold that at least under some circumstances a violation of Section 3604(a) can be established by a showing of discriminatory effect without a showing of discriminatory intent. [558 F. 2d at 1290].

The court then directed that in determining whether the particular circumstances of each case merit relief the following "four critical factors" be considered:

> (1) how strong is plaintiff's showing of discriminatory effect; (2) is there some evidence of discriminatory intent, though not enough to satisfy the constitutional standard of Washington v. Davis, [426 U.S. 299, 96 S. Ct. 2040, 48 L. Ed. 2d 597 (1976)]; (3) what is the defendant's interest in taking the action complained of; and (4) does the plaintiff seek to compel the defendant to affirmatively provide housing for members of minority groups or merely to restrain the defendant from interfering with individual property owners who wish to provide such housing. [558 F. 2d at 1290].

Accord: United States v. Mitchell, 580 F. 2d 789, 791 (5th Cir. 1978); Resident Advisory Bd. v. Rizzo, 564 F. 2d 126, 146-148 (3d Cir. 1977), cert. den. 435 U.S. 908 (1978); Smith v. Anchor Bldg. Corp. 536 F. 2d 231, 233 (8th Cir. 1976); United States v. City of Black Jack, Missouri, 508 F. 2d 1179 (8th Cir. 1974), cert. den. 422 U.S. 1042 (1975), reh. den. 423 U.S. 884 (1975);

United States v. City of Milwaukee, 441 F.Supp. 1377, 1382 (E.D. Wis. 1977).

We turn to the substantive issues of the appeal. The action was brought upon the Mt. Laurel principles that each developing municipality must "by its land use regulations, make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income", and that its obligation "to afford the opportunity for decent and adequate low and moderate income housing extends at least to ' *** the municipalities' fair share of the present and prospective regional need therefor." 67 N.J. at 174, 187-88.

In formulating a standard by which to decide whether defendants had met their Mt. Laurel obligations the trial court designated Middlesex County as the regional area for which present and prospective housing needs had to be determined. This finding rested upon acceptance of the plaintiffs' proofs. It then found that the projected need for low and moderate income housing in that region by the year 1985 which would have to be met by the 11 appealing municipalities, after deducting for subsidized replacement of existing substandard housing and the "filtering through" process as occupants moved to higher income housing, was 18,697 new units. The court then distributed among the 11 municipalities the number of units necessary to bring each up to the county wide proportion of 15% low and 19% moderate income population. The total number of units so assigned was 4,030. This figure was deducted from

18,697, leaving 14,667 units. Finding that there was "no basis not to apportion the [remaining] units equally," it divided 14,667 by 11, resulting in a further allocation per municipality of 1,333 units, in addition to those already assigned. Urb. League New Bruns., supra at 36-37. The court further ruled that the number of units assigned to each of the 11 municipalities should be allocated 45% low and 55% moderate income. It added that each municipality must rezone sufficient land to provide for the allocated number of units, which, for eight of the 11, meant rezoning all remaining vacant acreage suitable for housing. Id. at 38.

In resolving a claim of exclusionary zoning under Mt. Laurel, the court's determination of what the applicable housing region shall be is of considerable moment, obviously, since each municipality's responsibility must be measured in terms of the housing needs and resources of the region whose needs must be met. The paramount issue on this appeal, therefore, is the correctness of the trial court's determination that Middlesex County constituted the appropriate housing region.

That the program envisioned by Mt. Laurel is far more appropriate for legislative, rather than judicial, implementation is a proposition which no longer needs elaboration. Oakwood at Madison, Inc. v. Township of Madison, 72 N.J. 481, 531, 534, 541-42 (1977) (hereinafter "Oakwood at Madison"); Mytelka and Mytelka, "Exclusionary Zoning: A Consideration of Remedies," 7 Seton Hall L. Rev. 1,

5-6 (1975). Nevertheless, where the other branches of government do not act the courts have no choice but to deal with the issue "as effectively as is consistent with the limitations of the judicial process." Oakwood at Madison, supra at 536.

Early guidance for the selection of a region is found in Mt. Laurel, supra at 189-90. There the Court said:

> The composition of the applicable "region" will necessarily vary from situation to situation and probably no hard and fast rule will serve to furnish the answer in every case. Confinement to or within a certain county appears not to be realistic, but restriction within the boundaries of the State seems practical and advisable.

In that case the Court described as the appropriate region "the outer ring of the South Jersey metropolitan area, which area we define as those portions of Camden, Burlington and Gloucester Counties within a semicircle having a radius of 20 miles or so from the heart of Camden City". 67 N.J. at 162, 190.

The question took more specific form in Oakwood at Madison, supra, decided subsequent to the judgment of the trial court herein. In approaching the issue the Court emphasized that "the gross regional goal shared by the constitutent municipalities be large enough fairly to reflect the full needs of the housing market area of which the subject municipality forms a part." Id. at 536. We regard as particularly significant that the defendant municipality in that case urged the Supreme Court to find that the appropriate housing region consisted of the same area utilized

by the trial court herein, i.e., that embraced by the boundaries of Middlesex County. But its contention was rejected, and the Supreme Court affirmed instead the lower court's conclusion that the appropriate region for Madison Township* was that defined as "the area from which, in view of the available employment and transportation, the population of the Township would be drawn, absent invalidly exclusionary zoning." Id. at 543. This formulation has been characterized as one which "clearly points in the right direction." 3 Williams, American Land Planning Law §66.12 at 32 (1975). The Court repeated its admonition made in Mt.

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* Madison Township is also a nonappealing defendant in this case. Here its fair share obligation has been measured in terms of present and prospective low and moderate income housing needs within the very region the Supreme Court held inapplicable to this defendant in Oakwood at Madison, supra. As we note above, the Court there proceeded on the basis of a much larger area. The question suggested, which we are not called upon to answer, is whether an ordinance, once invalidated for exclusionary zoning and then amended to meet Mt. Laurel criteria, may nevertheless be repeatedly challenged on the same grounds but by different parties in successive suits involving distinctive proofs and theories as to the relevant housing region, its need for low and moderate income housing, and the extent of each municipality's fair share thereof.

The uncertainty could be resolved, of course, by statutory or administrative standards and definitions which maintain their stability as a matter of law from case to case. See Oakwood at Madison, supra at 531; Id. at 623 et seq., (Mountain, J., concurring and dissenting opinion). In default thereof the Mt. Laurel form of relief must be applied on the basis of judicially defined regions and judicial determinations as to each municipality's fair share. If these amount to nothing more than factual findings, governed by proofs which vary from case to case, and which are without precedential significance, one is left to speculate about the confusion which may arise from conflicting adjudications and the impact this may have upon any well ordered program of land use regulation.

Laurel that the concept of a county "per se" as the appropriate housing region is not "realistic", and stressed that consideration should be given to "the areas from which the lower income population of the municipality would substantially be drawn absent exclusionary zoning." (Emphasis in original). 67 N.J. at 539, 543.

Obviously, the mere physical boundaries of the State's political subdivisions in no way respond to these criteria. Indeed, in illustrating its requirements the Court furnished "examples of regions large enough and sufficiently integrated economically to form legitimately functional housing market areas" which were created under fair share allocation plans in other states. These were described thus:

> *** The Miami Valley (Dayton, Ohio) Regional Planning Commission includes five counties and 31 municipalities as far as 60 miles from the center of Dayton. The Metropolitan Washington GOG (see *supra* p. 529) covers 15 counties and local governmental jurisdictions, including the District of Columbia, San Bernardino County, California, although a county, occupies 20,000 square miles. The Metropolitan Council of the Twin Cities (Minneapolis-St. Paul) covers 7 counties, including almost 300 jurisdictions, with a total population of 1.9 million. The DVRPC, as already shown, comprises nine counties in Pennsylvania and New Jersey. The present significance of the cited plans is that their regions are of such size that it is difficult to conceive of a *substantial* demand for housing therein coming from any one locality *outside* the jurisdictional region, even absent exclusionary zoning. The essence of the cited plans is "to provide families in those economic categories [low and moderate] a choice of location." 16 *Trends on Housing*, No. 2 p. 2 (1972). [72 N.J. 539].

Not overlooked is the fact that in Oakwood at Madison the Court was dealing with but a single municipality, whereas here virtually all the municipalities in the county have been joined as defendants. We cannot conceive, however, in what way the appropriateness of a geographical area by which to determine low and moderate income regional housing needs is related to the number of municipalities in the projected area which have been made parties defendant.

In support of its conclusion that Middlesex County constituted a housing region for purposes of this action the trial court gave the following reasons:

> Middlesex County is a Standard Metropolitan Statistical Area as fixed by the United States Office of Management and Budget. Such an area is specified as an integrated economic and social unit with a large population nucleus. Twenty of the 25 municipalities joined in a Community Development Block Grant application as an "urban county" under the regulations of the Housing and Community Development Act of 1974, 42 U.S.C.A. §5301 et seq. A county master plan and a wealth of applicable statistics are available through the county planning board. Someone employed in any municipality of the county may seek housing in any other municipality, and someone residing in any municipality may seek employment in any other municipality. Residence within walking distance of one place of employment, or within the same municipality, is no longer a desideratum.

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> Nor is the availability of public transportation a major factor. The county is crisscrossed by arterial highways, including the New Jersey Turnpike and Garden State Parkway. Mobility by automobile is the rule. A large portion of even low-income wage earners within the county own automobiles and many of those travel regularly 20 miles or more to their places of employment. The entire county is within the sweep of suburbia. Its designation as a region for the purpose of this litigation, within larger metropolitan regions, is sustained. [142 N.J. Super. at 21-22].

These do not supply what was deemed to be critical in Oakwood at Madison, namely that the area of the region be large enough to ensure that it is one from which the prospective population of the municipality would be substantially drawn in the absence of exclusionary zoning. Many of the defendants are located within only a few miles of the county line. They are accessible to major highways and, as the trial court found, lie within either the New York or the Philadelphia metropolitan regions. 142 N.J. Super. at 21. In the face of these circumstances nothing in the findings or the recorded evidence could support a realistic expectation that the prospective population of these municipalities would be substantially drawn from within the confines of the county.

We conclude that the Supreme Court's determination in Oakwood at Madison that Middlesex County is not appropriate as a housing region governs the facts hereof.

We agree also with defendants' contention that the trial court, having determined that the ordinances were deficient under Mt. Laurel standards, should not have undertaken to make a formulaic allocation of the region's unmet housing needs among the defendant municipalities.* As the Court pointed out in Mt. Laurel, "The municipality should first have full opportunity to itself act without judicial supervision," noting that if the municipality should "not perform as we expect, further judicial action may be sought by supplemental pleading in this cause." 67 N.J. at 192. And in Oakwood at Madison, supra at 539, it further stated "that it would not generally be serviceable to employ a formulaic approach to determination of a particular municipality's fair share", a point of view frequently reiterated in that opinion. See pp. 499, 525, 541, 543-44. Additionally, the Court recently gave expression to an even more restrictive attitude concerning the allowable judicial remedy when it wrote the following in Pascack Ass'n, Ltd. v. Mayor & Coun. Washington Tp., 74 N.J. 470, 487-488 (1977):

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* Even if the action lay within its authority we could not approve the manner in which the trial court arbitrarily distributed the duty to meet the county's unmet needs equally among the 11 municipalities without taking into account their "variety of circumstances and conditions" and considering what effect the allocation would have upon the "advisability and suitability" of each zoning plan thereby affected. See Pascack Ass'n, Ltd. v. Mayor & Coun. Washington Tp., 74 N.J. 470, 482 (1977).

> But insofar as review of the validity of a zoning ordinance is concerned, the judicial branch is not suited to the role of an ad hoc super zoning legislature, particularly in the area of adjusting claims for satisfaction by individual municipalities of regional needs, whether as to housing or any other important social need affected by zoning. The closely contested expert planning proofs before the trial court with respect to the utility of the subject tract for various kinds of housing, office and research uses, hospitals and nursing homes, banks and public recreational facilities, is illustrative of the reasonable differences of opinion in this area. We went as far in that general direction as comports with the limitations of the judicial function, in our determinations in Mount Laurel, supra, and Oakwood at Madison, supra. The sociological problems presented by this and similar cases, and of concern not only to our dissenting brother, but ourselves, call for legislation vesting appropriate developmental control in State or regional administrative agencies. [Citations omitted]. The problem is not an appropriate subject of judicial superintendence. Clearly the legislature, and the executive within proper delegation, have the power to impose zoning housing regulations on a regional basis which would ignore municipal boundary lines and provide recourse to all developable land wherever situated, Oakwood at Madison, ubi cit. supra.

As we stated earlier, plaintiffs have failed to prove the appropriate region for which defendants have an obligation to provide their fair share of opportunity for construction of low and moderate income housing. Since the definition of such a region is essential to prove that the defendants exclude such housing through their choice of zoning policies (a choice, we

add, which must be proved "arbitrary", Pascack Ass'n, Ltd. v. Mayor & Coun. Washington Tp., supra at 484) it follows that the proofs were insufficient to support the claim of exclusionary zoning.

We have considered, but decided against, remanding the matter for a new trial. To do so would merely serve the purpose of allowing plaintiffs to pursue a theory which they eschewed in the earlier trial on an issue as to which they had the burden of proof. See Budget Corp. of America v. De Felice, 46 N.J. Super. 489, 494 (App. Div. 1957). Accordingly, the judgment is reversed.

A TRUE COPY

Elizabeth M. Langhlin

Clerk

NOTICE OF PETITION FOR CERTIFICATION

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APPELLATE DIVISION

OCT 9 1979

JS
Elizabeth McLaughlin
Clerk

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

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APPELLATE DIVISION
OCT 9 1979
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Elizabeth McLaughlin
Clerk

URBAN LEAGUE OF GREATER NEW BRUNSWICK, CLEVELAND BENSON, JUDITH CHAMPION, BARBARA TIPPETT AND KENNETH TUSKEY,	:	Docket Nos. A-4681-75, A-4683-75, A-4685-75, A-4720-75, A-4721-75, A-4722-75, A-4759-75, and A-33-76
Plaintiffs,	:	
v.	:	#5 cc
THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al.,	:	NOTICE OF PETITION FOR CERTIFICATION
Defendants.	:	

Notice is hereby given that plaintiffs in the above-captioned case will petition the Supreme Court of New Jersey for certification to the Appellate Division to review the final judgment of the Appellate Division of September 11, 1979.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this Notice of Petition for Certification was served by Express Mail upon the Clerk of the Supreme Court and by ordinary mail upon the following counsel for defendants this 5th day of October, 1979.

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