U.L. v. Cateret, East Brunswick 8/18 ~~1979~~ or 1980

- Brief on Behalf of East Brunswick w/ re to Amended Questions Submitted by the Supreme Court
  - Cover letter Rutgers Law school Dean re enclosed brief

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Dean John Payne
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August 18, 1980

Re: Urban League of Greater New Brunswick v. Borough of Carteret,
Our File No. EB-183

Dear Dean Payne:

Confirming your telephone request I enclose copy of Brief, Appendix and Supplemental Brief filed by East Brunswick in the above.

Very truly yours,

BERTRAM E. BUSCH

BEB/jkm
Enclosure

SUPREME COURT OF NEW JERSEY
DOCKET NO. 16,492

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,

Plaintiffs-Appellants,

vs.

THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al.,

Defendants-Respondents.

Civil Action

ON APPEAL FROM JUDGMENT OF SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

Sat Below:
Halpern, Ard and Antell, J.J.A.D.

BREIF ON BEHALF OF THE TOWNSHIP OF EAST BRUNSWICK WITH REGARD TO AMENDED QUESTIONS SUBMITTED BY THE SUPREME COURT

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SOUTHERN BURLINGTON COUNTY N.A.A.C.P., et al.,

Plaintiffs-Appellants, Cross-Respondents,

and

DAVIS ENTERPRISES,

Plaintiff-Intervenor,

-v-

TOWNSHIP OF MOUNT LAUREL,

Defendant-Respondent, Cross-Appellant.

SUPREME COURT OF NEW JERSEY
DOCKET NO. 17,041
A-192/193, September Term 1979

Civil Action

BRIEF IN REPLY TO 24 QUESTIONS ON BEHALF OF URBAN LEAGUE OF GREATER NEW BRUNSWICK, URBAN LEAGUE OF ESSEX COUNTY, SOUTHERN BURLINGTON COUNTY N.A.A.C.P., and NEW JERSEY DEPARTMENT OF THE PUBLIC ADVOCATE

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,

Plaintiffs-Appellants,

-v-

MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, et al.,

Defendants-Respondents.

SUPREME COURT OF NEW JERSEY
DOCKET NO. 16,492
A-146, September Term 1979

Civil Action

BRIEF

TABLE OF CITATIONS

PRELIMINARY STATEMENT

In the case of Urban League of Greater New Brunswick, Inc., v. Borough of Carteret, et al, Judge David Furman rendered his decision on May 4, 1976. During the pendency of the trial, which commenced on February 2, 1976, East Brunswick advised the Court that it was in the middle of a master plan review process and was about to adopt a master plan. The master plan, which was adopted on May 19, 1976, recommended massive rezoning of hundreds of acres of land from one-half acre residential and planned industrial park to planned unit development, townhouse and apartment uses. East Brunswick filed a post-judgment motion with Judge Furman seeking an Order of Compliance based on the master plan. That motion was denied and East Brunswick filed an amended notice of appeal with reference to the denial of the motion. In the years which have past since Judge Furman rendered his opinion, East Brunswick has implemented the master plan of May 19, 1976 with the adoption of new zoning ordinances. These ordinances have been submitted to the Court and to the attorneys for the plaintiff. Developers have received subdivision and site plan approvals and building permits and hundreds of townhouses and apartments have been in the course of construction since Judge Furman rendered his decision.

East Brunswick acknowledges that it is a developing municipality. The thrust of this Brief is to indicate that

the practical effect of Mt. Laurel in East Brunswick was the creation of an entirely new zoning ordinance with vastly increased densities on land most suitable for such development. In physical terms, this has meant hundreds of housing units which would not otherwise have been built without the guidelines set forth by the Court.

RESPONSE TO AMENDED QUESTIONS

1. The application of the duty not to exclude, as first announced in Mt. Laurel, to all types of housing (i.e. regardless of income level). East Brunswick understands the duty not to exclude, as applied to all types of housing, to mean that if a municipality rezones to prevent least cost housing at higher densities than previously were possible, then the municipality may also decrease the density in those areas which are environmentally sensitive and not suitable to intense development. A municipality which has shown a bona fide attempt to comply with Mt. Laurel should be permitted to adopt a balanced housing plan which would also allow housing on large lots. There would also be a valid zoning purpose to have minimum square footage for those houses on the largest lots in the municipality. This would be consistent with the case of Home Builders League of So. Jersey v. Berlin Township, 157 N.J. Super. 586 (Law Div. 1978), Petition for Certification granted, 77 N.J. 503 (1978), Affirmed 81 N.J. 127 (1979), in which Mr. Justice Schreiber wrote for a unanimous Court:

> "We have acknowledged that zoning restrictions and limitations may have some economic effect in elevating the cost of a house, but nothing in the Municipal Land Use Law sanctions such economic segregation in and of itself as a proper zoning goal. We hold that when it is shown that a municipality has adopted as part of its zoning ordinance a minimum size living area provision which is on its face unre-

> lated to any other factor, it will be presumed to have acted for improper purposes. The burden is then on the municipality to establish that a valid base does exist." 81 N.J. 127, at Pages 141 and 142.

A municipality would satisfy its burden if it could show that in some parts of town, zoning provisions have been made for least cost housing. In other parts of town, where it is necessary to preserve the character of the neighborhood, minimum floor areas could be required on large lots, provided that the floor areas were tied to a legitimate zoning purpose.

2. The appropriate procedural posture for the joinder of necessary/desirable parties in an exclusionary zoning suit (for example, neighboring municipalities in a particular county of region).

In Mt. Laurel, Justice Hall observed that confining the region to a county appeared not to be realistic. The plaintiffs in the Urban League of Greater New Brunswick, Inc. case sued twenty-three municipalities in Middlesex County. When the defendants brought a motion to add Franklin Township in neighboring Somerset County, that motion was denied by Judge Furman. Franklin Township borders Piscataway, New Brunswick, North Brunswick and South Brunswick, all of which were in the Urban League suit. It is a developed area directly adjacent to other developed areas which were part of the Middlesex County suit. It was not the defendant in any other suit where a claim was made that Franklin Township was part of some other region. There was no valid reason to exclude Franklin Township other than the possibility that this would make plaintiffs proofs more difficult since they were relying upon a data bank for Middlesex County.

While Franklin Township could have resisted the proposed joinder in the Middlesex County suit, procedurally the motion should have been granted and Franklin Township would have been insulated from any subsequent claims that it belonged in a different region.

The Franklin Township case is typical of many other municipalities throughout the state. It also shows the difficulty of handling regional zoning by the haphazard choice of defendants in zoning litigation. If there were a guaranty that Franklin Township would have to comply with regional needs in whatever region it was located, by executive or legislative direction, there would be no danger of its being subjected to "double jeopardy".

If the matter remains in the Courts, it would seem that the Courts could become less concerned about region and more concerned about balanced housing plans within each community. If each community were required to have a balanced housing plan, then regional needs would be served by these plans and the Court would not have to draw arbitrary boundaries or establish unmanageable criteria to define region.

3. The relevance of the Municipal Land Use Law in exclusionary zoning cases.

The Municipal Land Use Law states as one of its purposes

> "To guide the appropriate use or development of all lands in this State in a manner which will promote the public health, safety, morals and general welfare." N.J.S.A.40:55D-2(a)

While the above quoted portion of the Statute refers to all lands, this is just the purpose portion of the Statute and does not state that each application for development must promote the general welfare. It would seem that the standard adopted in Home Builders League, supra, is whether an ordinance has effects contrary to the general welfare even though the regulation bears some relationship to legitimate zoning purposes.

While East Brunswick believes that the Municipal Land Use Act is largely procedural, if the Court holds that the general welfare zoning purpose is a substantive requirement, then it must apply to all municipalities and not just those which are developing.

4. The significance of Executive Order No. 35.

Governor Byrne issued Executive Order No. 35 on April 2, 1976, directing the Division of State and Regional Planning to prepare state housing goals. There were goals that municipalities could use as a guide in the adoption of their zoning ordinances which would meet their fair share obligation. Executive Order No. 35 directed that a priority in state funding should be given to municipalities which met their fair share. The implication that followed was that a lower priority in state funding would go to municipalities which did not meet their fair share. The Order also required the Division to prepare a housing allocation report.

In December, 1976 the Division of State and Regional Planning prepared a report which it submitted to the Governor and, at that time, the Governor issued Executive Order No. 46. He returned the report to the Division and asked it to consider several additional very important factors in modifying that housing allocation report. One of the factors they were to consider was programs to revitalize and to redevelop the central cities as well as statewide planning objective. A preliminary report of these objectives was subsequently issued in September, 1977, known as the State Development Guide Plan. In May of 1978, the Statewide Housing Allocation Plan for New Jersey was released, pursuant to Executive Order No. 46.

The significance of Executive Order 35 relates to the fact that the executive branch of government feels that it is best suited to allocate fair share figures on a statewide basis. The mere existence of the Order reflects the tension between the Executive and Judicial branches of government. It also calls into question the possibilities of implementing a statewide plan. A basic defect of the administrative effort is the total failure to reflect local or county concerns or input. For further discussions see Fair Share Housing, "Introduction and Overview" by Jerome G. Rose, April 1979. 10

5. The practical effects of Mt. Laurel, Oakwood, Paseack, and Fobe on zoning and housing in New Jersey.

The preliminary statement of this Brief indicates the substantial changes in zoning and housing which East Brunswick experienced as a direct result of the Mt. Laurel case. East Brunswick is not aware of any other municipalities which have attempted to comply voluntarily with Mt. Laurel. The cause of this general non-compliance is not the failure of the Court to articulate its position clearly. Rather, it seems that the judicial process is so ponderous that the incentive to municipalities to take action is virtually non-existent Moreover, the singling out of individual municipalities or groups of municipalities in individual counties results in resistance because the policy makers and the citizens in those municipalities feel that they have been discriminated against.

In a survey conducted by the Middlesex/Somerset/Mercer Regional Study Council in 1978, 32 communities were considered on the question of zoning provisions for new low or moderate housing units. Of those communities, only five included a requirement that new developments should have low and moderate income units as part of the development. Fewer than half offered tax abatements to low and moderate income housing. Only about half had passed a resolution of need stating that there was a need for such housing in the community.

Only seven of the communities had enacted a Housing Authority. Some communities have placed their least cost housing on the periphery of the community so that the impact would be felt by adjacent towns. Others have zoned for such development on environmentally unsuitable land. Because very few communities have responsed to Mt. Laurel, a reverse domino effect has been created. No community wants to appear to be the "patsy", responding to a Court directive while its neighbors do not.

Mt. Laurel recognized that neither the Courts nor the municipalities build housing. Those communities which have made some changes in zoning, have done so knowing that the building will never take place. By comparison, East Brunswick has adopted a resolution of need, has agreed to tax abatement and has agreed to subsidize senior citizen least cost housing in the center of town directly adjacent to the municipal complex. The construction on this subsidized housing has already begun. There is little question that this housing was not politically acceptable before Mt. Laurel and the pending Urban League case. It was only after Mt. Laurel that the municipal leaders were able to explain to the citizens of East Brunswick that changes were coming and it was up to the citizens whether they would be specifically mandated by the Court or initiated locally.

The changes in zoning and housing patterns in East Brunswick could not have come about had the Courts not

taken the lead. East Brunswick also has taken account of inflation and economic realities. The American dream of a detached house on a large lot is obviously out of the reach of most young couples.

Even though East Brunswick has removed cost generating requirements in its planned developments, and even though East Brunswick has included density bonuses for least cost housing, the developers are most interested in maximizing their profit rather than in performing a social service. This means that if a greater profit per unit can be obtained by constructing a middle class or luxury unit, this is what will be constructed even though there may be density bonuses for least cost housing.

Where East Brunswick has encouraged developers to utilize the density bonus provisions of its ordinances and a developer has made a good faith effort to do so, the red tape encountered in dealing with the State and Federal bureaucracy and the limited amount of funding available for subsidy has discouraged both the municipality and developers. Even though a developer may be gaining additional units of conventional housing, he is confronted by extra cost, delay and a general hassle in attempting to package a least cost housing component. Because of the high cost of land in East Brunswick, it is impossible to construct low or moderate income housing without substantial subsidies from the State or Federal government.

The result is higher density housing which is not affordable by any persons of low income and by only the top of the moderate income scale.

If East Brunswick wanted to freeze all development, it could require 50% low income housing for any future development. This would absolutely chill the sale of land for the future development of East Brunswick since it is an impossible requirement to meet. Nevertheless, this action would be defensible under Mt. Laurel as a bona fide attempt to meet the social goals which have been established.

It is clear that partially developed municipalities which have an existing infrastructure and which also have officials who are willing to make a bona fide attempt to reduce the cost of housing, will be the only municipalities which enable the actual construction of lower cost housing in New Jersey.

6. Will the attainment of the goal of Mt. Laurel to provide housing opportunities for low and moderate income people outside of the urban areas adversely affect the goal to rehabilitate central cities.

There was substantial argument and cross-examination in the Urban League of Greater New Brunswick case showing that if housing opportunities developed outside of the central cities for persons of low and moderate income, there might be a general abandonment of the cities by their residents. The urban policies of federal and state government in recent years have placed more emphasis on revitalization of the central cities than on the suburbs. While the people who move from the cities under fair share allocation plans will benefit, those whom they leave behind will not. As Professor Rose noted in Fair Share Housing, supra,:

> "Fair Share Housing Allocation Plans permit moderate income families to move from the city more easily. Their lot will be approved; there is no question about that. They will improve their lot; but the plight of the low income families who must remain will only be worse." (Pages 12 and 13)

Judge D'Annuzio recognized the problem of "white flight" in Glenview Development Corp. v. Franklin Township*

> "Lowering the barriers to high density development would probably promote and encourage movement of the white middle class from the traditional urban centers and their surrounding suburbs. A continu-

*164 N.J. Super. 563 (Law Div. 1978) at Pages 575 and 576.

> ation and exaggeration of that movement would tend to exacerbate currently existing social and economic visions and would probably severely hamper an urban renaissance."

As Professor Rose observed, the city schools would be left to the less educationally advantaged which would diminish the quality of the city school system and tend to encourage further flight of the remaining middle class families from the city. When they leave, they leave the neighborhood stores without their customers and the cities' fiscal problems are left on the shoulders of those who are least able to bear that burden.

Professor Rose expanded on his analysis of the impact upon the cities in a paper which was given at the League of Municipalities Conference on November 14, 1979 in Atlantic City, which paper was printed in New Jersey Municipalities April, 1980, "The Far Reaches of the Mt. Laurel Decision". He noted the existing flight from the cities to the suburbs and from New Jersey to the sun belt. He further noted that tax revenues of the cities have not kept up with rising costs and the cities have had to rely more and more on state and federal aid and have had to cut back on services and capital improvements. He concluded that the cities must not be abandoned and that federal and state policies must continue to be directed toward the cities in order to revitalize and maintain them.

7. Limitation of Mt. Laurel to developing municipalities.

Professor Rose concludes in his article in New Jersey Municipalities that the limitation of the Mt. Laurel doctrine to developing municipalities will prevent wall to wall urban sprawl in New Jersey. While there might be some rationale for excluding the truly rural areas from the Mt. Laurel doctrine, there is no rationale for the exclusion of the urban centers. Because the federal and state governments are primarily interested in making funding available to the older urban areas, least cost housing must be provided in those areas. The cities have the infrastructure, a high proportion of the jobs and transportation and should be directed to provide housing for low and moderate income people.

In the Borough of Washington, Bergen County, the Court held that developed municipalities were not required to come under the Mt. Laurel umbrella. Within a short time after that decision, the Borough of Washington approved a luxury garden apartment development for one of the last remaining sites in the community. Had the Mt. Laurel doctrine included developed areas, as well as those which are developing, the remaining land in the Borough of Washington could have been used for least cost housing.

East Brunswick takes the position that the basically developed municipalities must be part of any statewide plan for least cost housing. See "The Far Reaches of the Mt. Laurel

Decision", Article by Michael Hawkins, Page 19, New Jersey Municipalities, April, 1980.

9. The wisdom of a per se rule against large lot zoning.

Prior to Mt. Laurel, East Brunswick's vacant land was largely zoned for planned industrial parks and residential housing on lots of one-half acre and one acre. As a result of the post-Mt. Laurel rezoning, much of the vacant land was rezoned to townhouses, garden apartments and planned unit residential developments. The environmentally sensitive land, however, which had been zoned for one acre, has been rezoned to two and three acre zoning because of the existence of regionally significant aquifer recharge areas.

East Brunswick takes a position that large lot zoning should be established upon sound environmental criteria and should be supported by municipal, county and state master plans. Such zoning is appropriate even in a developing municipality if there is sufficient land set aside for provision of least cost housing and if there is a balance in the community between housing and jobs. If it is proven that a municipality has excluded townhouses and apartments and if large lot zoning cannot be justified on environmental grounds or on grounds of preservation of the character of an area, then such ordinances should be found invalid.

11. The proper function of the Housing Allocation Plan in exclusionary zoning litigation.

As was stated above, the Housing Allocation Plan was released without any local participation and without any citizen input. There is no mechanism in the plan to challenge the allocation. It seems arbitrary to impose a burden upon a municipality to demonstrate that the allocation is inappropriate in a Court situation. The plan is viewed locally with suspicion and hostility and should not be used as a guide by the judiciary in reviewing exclusionary zoning cases.

If the Courts were to impose the Housing Allocation Plan upon a particular municipality, they would be, in effect, taxing existing residents in order to subsidize new residents. The hostility is based upon the premise that the Courts and the legislature are saying: "let's make all those comfortable rich people in the suburbs take care of all of the poor people in the cities".

The state should have the burden of proof of the reasonableness of the Housing Allocation Plan which was based upon documents and studies made from documents rather than from participation by local Planning Boards and governing bodies.

It should be remembered that the Housing Allocation Plan is a guide and that it is based, in part, upon future predictions which may have no basis in fact. While East Brunswick approves of statewide attempts to formulate an

allocation, this particular plan fails to take into account specific impediments to development. Middlesex County has been placed in region 11 in the plan and is one of eight counties in that region. This, in itself, indicates that the Appellate Division in the Urban League of Greater New Brunswick, Inc. was correct in determining that Middlesex County could not, in and of itself, be considered a housing region. It is also interesting to note that under the Housing Allocation Plan, the central cities of New Brunswick and Perth Amboy receive allocations totalling almost 2,700. Judge Furman dismissed those cities from the litigation because he did not feel that they are necessary parties to the allocation scheme which he adopted.

East Brunswick objects to the criterion of personal income as a factor in the Housing Allocation Plan. If a municipality has made provision for a choice and variety of housing, it should not be penalized because its existing residents had a per capita income higher than a county average.

If a municipality approachs the allocation set forth in the Housing Allocation Plan, this should demonstrate absolute compliance with Mt. Laurel and not just prima facie compliance.

12. The function of the State Development Guide Plan in exclusionary zoning litigation.

The State Development Guide Plan is very broad. At such time as it becomes more detailed, it might reasonably be relied upon by legislators, planners, local policy makers and the Courts. The State Development Guide Plan classifies municipalities which are partially developed as those which are most suitable for immediate municipal action. The plan fails to take into account, however, that a developing municipality in fact may still have environmentally sensitive land which the state thinks is developable. East Brunswick has no objection to the characterization of portions of the municipality as growth areas or limited growth areas, but if feels that the state must take into account the open space areas which have little or no infrastructure and which are environmentally sensitive.

Portions of East Brunswick should be included in the "deferred allocation" category even though the municipality in part is developing. For these reasons East Brunswick objects to the general categories which are used in the State Development Guide Plan.

13. The relevance between the definition of the appropriate region and the use of formulaic analysis to determine fair share/regional need.

The Appellate Division in the Middlesex County case held that the plaintiffs improperly defined the region and accordingly came up with the wrong definition of those persons who allegedly were excluded by municipal zoning practices. East Brunswick was the only municipality in the Middlesex County case which came up with an alternative fair share housing allocation plan. In spite of the good faith shown by East Brunswick, the trial court chose to disregard this bona fide attempt to confront the allocation issue. East Brunswick submits that once a municipality has come up with a fair share allocation plan the burden must shift to anyone challenging that plan to prove that it is not reasonably calculated to meet that municipality's obligation.

If each municipality were required to develop zoning which provides for a balance across a range of possible housing alternatives, the Court should not have to get into a dispute as to the definition of region or as to the validity of any particular fair share allocation plan. If the requirement for balanced housing were imposed on those municipalities designated as growth areas on the State Development Guide Plan then it would not be necessary to choose between allocation plans.

No municipality should be required to meet the housing needs of the Northeast Corridor nor should a municipality be ordered today to meet the speculative future needs which may or may not exist in 1990. Most of the planning data which was used in the Middlesex County case had been developed during the 1960's when none of the planners were considering the abrupt halt to growth in New Jersey. It seems unfair to order a municipality to rezone its land where the need may never exist.

14. The irrelevance of an existing county-wide percentage of low and moderate income housing.

East Brunswick was saddled with the greatest obligation to provide housing for persons of low and moderate income housing in the Middlesex County suit because it had the lowest percentage of low and moderate income housing people in the county. The Court chose to ignore any relationship between jobs and housing, between transportation and housing and between environmentally sensitive land and housing.

Now that East Brunswick has completely revised its zoning ordinance and has implemented a master plan which complies facially with Mt. Laurel, the relative wealth of the municipality should have no bearing on its obligations to zone for least cost housing.

15. Relevance of fair shair formula to employment and poor persons residing in a municipality.

East Brunswick takes the position that a municipality should provide housing for employees based upon that municipality's own existing and projected employment. If one municipality has encouraged industry and business to locate there, it is unfair to ask another municipality to provide housing for its employees. The first municipality has the ratables which generate the jobs and is better able to provide for the municipal services and infrastructure required to support housing for those employed there. It seems patently unfair to allow a municipality to reap the benefit of industrial growth within its boundaries without bearing the burden of providing housing.

A change in employment figures should not affect the determination. If employment declines, presumably the need for housing in the municipality will also decline and the market will adjust to reduce the number of units produced.

In Pascack Assn., Ltd.v.the Mayor and Council of Washington Township, 74 N.J. 470, (1977), Mr. Justice Pashman repeated the criteria and factors which should be considered in arriving at a community's "fair share". East Brunswick finds certain of those factors irrelevant. What difference would it make whether a town's population density

is smaller or greater than that of the region at large. Who cares whether the municipality previously violated the precepts of Mt. Laurel if the point is that zoning for least cost housing should be placed where it is best suited. If a municipality has the necessary infrastructure and has attracted ratables and jobs, then it should provide housing for those people who work in the municipality and should rehabilitate housing for its resident poor. These obligations should be imposed upon all municipalities regardless of their development status.

16. The function of the "time of decision" rule.

In Oakwood at Madison, Inc. v. Tp. of Madison, 72 N.J. 481 (1977) and in So. Burlington Cty. NAACP v. Tp. of Mt. Laurel, 67 NJ. 151 (1975) the Court has considered revisions to zoning ordinances following a finding of unconstitutionality. Most recently the Court has held in Kruvant v. Mayor and Council, Tp. of Cedar Grove, 82 N.J. 435 (1980) the trial court did not err in refusing to consider a last modification to a zoning amendment adopted beyond a 90 day period provided in a previous order. Nevertheless, the Court in Kruvant upheld the general proposition that the time of decision rule is necessary to avoid rendering an advisory opinion on a moot question. In accordance with that principle, if the Supreme Court were to reverse the Appellate Division in the Middlesex County case, there would have to be a complete retrial as to East Brunswick because of the enactment of an entirely new zoning ordinance. The Court further cited earlier cases to the effect that an amendment to a zoning ordinance presumably furthers the public health, safety, morals or welfare and the application of the ordinance at the time of decision serves a beneficial purpose.

East Brunswick concurs with Kruvant. If an amendment is made beyond the time period allowed by a Court or if it is not made in good faith, then the Court should not be bound to consider it.

17. Should a trial court retain jurisdiction to rule on orders of compliance after the main case has been appealed.

Notwithstanding the appeal on the Middlesex County case, Judge Furman encouraged all municipalities to modify their ordinances and to return to Court, if appropriate, on motions seeking orders of compliance. Sayreville and Edison, in fact, returned to Court and obtained such orders. East Brunswick filed a motion for compliance but, as was stated above, it was denied.

East Brunswick preliminarily takes a position that remedies should not be imposed by the Court in the first place. Once a matter is on appeal, it is especially risky for a trial judge to be considering motions for compliance where an appellate court may in fact decide that the original trial judgment was incorrect. This is exactly what happened in the Middlesex County case. The trial court should not be set up as a one person super-planning board. It would be preferable if the remedy were supervised by an administrative planning agency, such as the County Planning Board. In that way there would be little of the adversary posturing which inevitably results from a courtroom confrontation. Once a municipality has presented itsown fair share plan, it would seem that the best means of implementing that plan would be to refer to an administrative agency. The Court should not retain jurisdiction.

19. The validity of a "trickling down" theory in the current housing market.

Professor Rose has written on the "trickling down" theory in Fair Share Housing, pages 13-15. He writes as follows:

> "As middle income families leave the city, their dwelling units will become occupied by low income families; this is the "trickle down" theory working at its best. This is what the "trickle down" theory is supposed to do. The upper income people leave and the lower income people then move into their dwellings. However, because lower income families then occupy these units, they can only pay, by the definition of "low income" people, a rent which is less than what "middle income" families pay. Consequently, in time, the gross rental roll to the landlord, that is, the total amount of rental income he gets, will decrease. This will result in a lower capitalized value of his building, a lower assessed value of the building for tax purposes, and lower taxes for the city. A similar process takes place when the local merchants follow their customers to the suburbs. The exodus of middle income families also results in a high proportion of high cost components of the city's population as compared to the tax productive components of the city's population."

It is apparent that the "trickling down" theory will not work unless there is also housing subsidy of some kind. In addition, the current housing market is stagnant because of the high cost of borrowing. If the upwardly mobile population of the city cannot afford to move to the suburbs, this will create a housing demand in the city at the higher

income levels. When a family manages to move out, the higher demand will have caused higher prices in the city and persons of lower and moderate income will not be able to afford the vacant house unless there is a subsidy.

In effect, East Brunswick does not think that the "trickling down" theory works.

20. The function of "phasing" in fair share plan.

If a fair share plan is to be imposed upon a municipality, phasing is absolutely essential. Phasing should be related to a rational basis such as the reasonable debt capacity of the community, its existing tax structure, needed improvements and the municipal budget. If a municipality were required to enable housing which it would not otherwise have done on its own, the Court should entertain proofs which will show the added costs to the municipality. At that point the Court should also grant an order adjusting the cap limitations in such a municipality to the extent of the added financial demands for municipal services.

Phasing is a concept which is known to planners and planning boards. It is routinely used with applications for planned unit residential development.

As Professor Rose noted (Ibid. page 15 - 16), there will be a fiscal impact of fair share housing allocations upon the suburbs. As a result of the increase in population there will be an increase in the cost of services for education, roads, sewers and community facilities. This will result in higher taxes, which will fall most harshly on lower income suburban residents who can least afford them.

Builders and developers, who stand to profit most from the Mt. Laurel doctrine, will claim that phasing is just another stalling tactic by the exclusionary suburbs. In fact,

the public interest plaintiffs should realize that phasing is an indispensable part of any fair share allocation plan.

21. The legal and practical implications of remedial devices.

If an ordinance has been invalidated, the Court should allow at least 180 days to draft a new ordinance in order to allow for appropriate planning and citizen participation. Suburban residents will respond more positively if they do not believe that the Court is cynically imposing its will upon the people without their participation and involvement.

An order for specific rezoning of a builder's land will result, quite possibly, in development in the wrong location and not in keeping with a comprehensive plan. As Professor Rose recognized (New Jersey Municipalities, April 1980, page 30), the primary beneficiaries of the Mt. Laurel decision are not the low and moderate income residents of the central cities but the owners, investors and developers of real estate in the suburbs whose land values increase with the expectation of higher permitted densities.

If the Court were to order a municipality to take affirmative action in seeking subsidies, providing density bonuses or instituting rent-skewing that would constitute a preemption of what are reasonable local legislative prerogatives. Moreover, a municipality that was ordered to apply for a grant could purposely "torpedo" the application. The quality of grant applications can vary based upon the cooperation of local officials. A municipality ordered to apply

for subsidies could engage quite easily in an exercise of gracious non-compliance.

With regard to density bonuses, East Brunswick has said that it is probably the least effective way of encouraging least cost housing.

If the Court ordered rentals to be tied to the income of a tenant, it is likely that landlords would not re-invest in such rental units.

22. Should remedies be tracked to the level of need or can they be "numberless"?

If each municipality were able to submit its own fair share plan, as is suggested by Oakwood, there would be no reason to get into the numbers business. A municipality which submits a balanced housing plan could then be certified by a county administrative agency as being in compliance with housing requirements. That municipality would then be immune from suit by a builder who felt that his particular property should be rezoned for higher densities.

All figures which pretend to be scientific in fact are based in large part upon guess work. A numberless remedy would avoid the hypocrisy of pretending to meet specific numerical need.

23. The function of expert planners in exclusionary zoning litigation.

In the Middlesex County case a detailed rebuttal fair share plan was presented by East Brunswick. The Township was not permitted to give oral testimony as to the plan but the Court assured all parties that it would consider any plan submitted. There is no indication in the opinion of the Court that the plan was even read. It is apparent that Judge Furman did not accept the fair share plan submitted by Ernest Erber, plaintiffs' expert in that case. If the Court also did not accept the defense plan, presumably it could have retained an expert with costs to be prorated among the parties.

In no event should the Court abrogate its duty to decide a case. If the Court feels that it does not have jurisdiction then the case should be dismissed. Once the Court has jurisdiction, however, it would be improper for the Judge to simply incorporate a plan which may be imposed upon the community without even the semblance of judicial edict.

If a plan is not the product of expert advice and citizen participation, it will never be accepted and all of the Court's good motives will most likely be thwarted.

CONCLUSION

For all of the reasons set forth above, East Brunswick would make the following suggestions:

1. Allow each municipality to submit its own fair share plan. If it meets a housing need, without regard to the rest of the region, then the plan should be accepted.

2. The Court should suggest that a balanced housing act be adopted with implementation to be made administratively either through county planning boards or the State Department of Community Affairs. After a trial court accepts the bona fide balanced housing plan submitted by a municipality, the administrative body should be charged with implementation of the plan.

3. Any municipality which has reached the point of implementation should be guaranteed immunity from subsequent challenges by builders or public interest plaintiffs, provided the plan in fact is being implemented and construction is actually underway.

4. In lieu of the foregoing, it is respectfully submitted that the Supreme Court should affirm the decision of the Appellate Division in the Middlesex County case.

5. In the event that the Court reverses the Appellate Division in the Middlesex County case and does not follow the requests made above, it is respectfully submitted that there be no retrial, which will be incredibly costly

and time consuming. Instead the Court could simply request each municipality to return to the trial judge to seek an order of compliance.

Respectfully submitted,

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