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Brief of Amicus Curiae Honorable Stanley C. Van Ness, Public Advocate of New Jersey.

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SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION
MIDDLESEX COUNTY
DOCKET NO. C-4122-73

URBAN LEAGUE, etc., et al,

Plaintiffs,

vs.

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

Defendants

BRIEF OF AMICUS CURIAE
HONORABLE STANLEY C. VAN NESS, PUBLIC ADVOCATE OF NEW JERSEY

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POINT I

THE MOTION FOR SEVERANCE SHOULD NOT BE GRANTED SINCE THE PLAINTIFFS HAVE ALLEGED FACTS WHICH IF PROVED WILL JUSTIFY A REGIONAL REMEDY FOR THE HOUSING SHORTAGE IN MIDDLESEX COUNTY.

The motion for severance in this case is more than merely a procedural device. It is in actuality a motion to dismiss the plaintiff's complaint.

The factual allegations of the complaint (allegations 15 through 33) are entirely couched in regional terms. Allegation 15 states that Middlesex County is a common housing and labor market area; most of the remaining factual allegations contain specific statistical data with regard to this common economic region. There are, furthermore, allegations that the source of plaintiffs' housing difficulty is not the conduct of one municipality but the parallel conduct of all 23 defendants (see allegations 32 through 35).

Based on these factual assertions, the plaintiffs in their second prayer for relief have asked for a joint effort on the part of the defendants to remedy the housing shortage they have created in Middlesex County.

The above descriptions, including the prayer for relief, clearly demonstrate the thrust of the complaint to be the regionwide housing situation in Middlesex County and a need for regionwide relief. The motion for severance if granted will directly dismiss plaintiffs' second prayer for relief and negate the regional thrust of all of the plaintiffs' factual pleadings. Given that, the granting of severance will have such a basic effect on this litigation, that the motion should be evaluated as a motion to dismiss rather than as a motion merely dealing with trial convenience. In other words, the motion should not be granted unless the plaintiffs'

factual allegations and all reasonable inferences therefrom would fail to support the regional relief which they are seeking. Valle v. Stengel, 176 F 2d. 697 (3 Cir. 1949).

To decide whether the complaint is insufficient as a matter of law to support a regional remedy, the court should look not only at the allegations themselves but at the legal standards for intermunicipality remedies for violations of statutory and constitutional rights. The allegations themselves, as noted previously, essentially state that Middlesex County is a unified community for housing and jobs and further state that the defendants' actions have infringed plaintiffs' statutory and constitutional rights to participate in this common housing and economic community.

The law applicable to these allegations is sparse and consists principally of two cases decided within the past three years.

The lead, if not the only, New Jersey case concerning intermunicipality remedies is Jenkins v. Morristown School District, 58 N.J. 483 (1971). In that case the New Jersey Supreme Court ordered the Commissioner of Education to merge the school districts of Morristown and Morris Township. The court relied essentially on three factual findings as justifying its imposition of the first involuntary school consolidation in New Jersey history. First, the court found that Morristown and Morris Township, while politically separate, constituted one common community whose history and development were closely linked. 58 N.J. at 485-487. Second, the court found that merger would promote integration and educational excellence in accordance with state constitutional and statutory policies. 58 N.J. at 505. Finally, the court held that the merger involved no problems of feasibility since little extra busing or expense would result. Id. With these essential facts having been proved, the court went on to order regionalization and in so doing ignored the many state statutes which set forth a careful and seemingly exclusive procedure for regionalization through voluntary action.

More recent decisions of the Supreme Court have tended to confirm and perhaps even broaden the holding of Jenkins v. Morristown. In Robinson v. Cahill, 62 N.J. 473 (1973), Jenkins was cited in a footnote as holding that the Commissioner of education could, "to cope with a probelm of racial balance, order a solution which crosses district lines if such a solution is not impracticable." 62 N.J. at 509. This reading of Jenkins, while expressed in dicta, appears if anything, to loosen the requirement that a finding of intermunicipality unity would be a necessary prerequisite to a regionwide remedy.

Further, in Quinton v. Edison Park Development Company, 59 N.J. 1971, the court obliquely extended the range of Jenkins to cover land use when it cited Jenkins as well as the zoning cases to support its assertion that the appropriateness of zoning regulations depends in part on their regional impact. 59 N.J. at 578. The court in Quinton passed on the legality of a zoning ordinance provision which could be construed to mandate a 100 foot buffer zone around commercial areas except for those portions of commercial areas which directly bordered on neighboring municipalities. Noting that shopping centers impacted people in adjacent municipalities as drastically as Edison residents, the court held that the ordinance would be saved from invalidity only if it were construed to protect all persons within 100 feet of shopping centers whether they lived within or without Edison. The mention of Jenkins as a cross-reference along with the traditional regional zoning cases such as Dumont v. Cresskill, 15 N.J. 238 (1954) and Kunzler vs. Hoffman, 48 N.J. 277 (1966), shows that the court recognizes some parallelism between education and zoning cases. The recognition of such a consequence certainly suggests that a remedy found appropriate in an education case might also be applied in a land use case.

The second leading case, a federal case, on intermunicipal remedies for unreasonable restrictions on the access to housing is Gawtreaux v. Chicago Housing Authority, 43 Law Week 2108, decided by the 7th Circuit on August 26, 1974.

This ruling was the latest in a more than eight year battle over the racially discriminatory site selection policies of the Chicago Housing Authority. See Gautreaux v. City of Chicago, 480 F 2d. 210, 211 (7 Cir. 1973) for a brief history of the litigation. The City having long ago been proven to have violated the fourteenth amendment in choosing sites for public housing, the question in the recent decisions has centered on the proper remedy. The latest round of litigation has developed from the plaintiffs' attempt to secure a metropolitan remedy for segregated housing patterns. This attempt was rejected by the District Court. Gaubreaux v. Romney, 363 F. Supp. 690 (N.D. Ill. 1973). On appeal the Seventh Circuit reversed, holding, 43 Law Week 2108, that a metropolitan remedy was not only feasible but appropriate since the metropolitan area was the only relevant one for discussion of housing needs. In effect, the court utilized the factors of feasibility and community in a housing context that Jenkins had employed in an education situation. However, the circuit court had to traverse a more difficult path to its pro-regional decision since it had to contend with a United States Supreme Court case, Milligan v. Bradley, 414 U.S. 1126 (1974) which, unlike Jenkins, severely restricted the scope of regional desegregation remedies. Thus, not only does the Gawtreaux decision put the federal courts on record as favoring regional housing remedies, but it also indicates that housing problems are more appropriate for regional treatment than education problems. Since the New Jersey courts have the power to regionalize educational systems, they should, under Gautreaux, a fortiori, have the power to require regional land use plans. See Crow v. Brown, 332 F. Supp. 382, 395-396, (N.D. Ga. 1971), aff'd 457 F 2d. 788 (5 Cir. 1972), requiring county

officials, as to whom racially discriminatory bias against public housing had been shown, to consult with the Atlanta Housing Authority about appropriate sites for public housing in portions of the county under their jurisdiction. Further, such plans can be imposed without direct proof of racially discriminatory interest since, as Judge Skelly Wright noted in a widely quoted passage,

> "we now firmly recognize that the arbitrary quality of thoughtlessness can be as disastrous to private rights and the public interests as the perversity of a willful scheme." Hobson v. Hanson, 269 F Supp. 401, 497 (D.D.C. 1967).

If state courts do have the power to order housing remedies, there can be no question that the allegations in the instant case make it an appropriate one for regional treatment. Essential to the holdings of Jenkins and Gautreaux are findings that the plaintiffs were denied access to regions, which constituted a single community for education or housing purposes. Certainly the plaintiffs have alleged sufficient facts to show that Middlesex County is a unified housing community from which they have been arbitrarily barred. Whether they can prove the denial of access and the existence of this community is a question to be left to trial. At this stage of the case however, their complaint standing alone should render plaintiffs immune to any claim that they have not laid the proper foundation for eventual proof that a unified housing market exists in Middlesex County. For that reason the motion for severance should be denied. If discovery or trial should show that the plaintiffs could not in fact prove their allegations, the court will have ample power to take appropriate action.

Amicus curiae would also suggest that local zoning is no longer the sacrosanct totem it once was. In several statutes the Legislature has defined regional cummunities and stripped localities of some or all of their land use powers over these regions. Thus, the Hackensack Meadowlands Reclamation and Development Act, N.J.S.A. 13:17-1, et seq., L. 1968, c.404 delegates power to zone in the Meadowlands to a Hackensack Meadowlands Development Commission. The Pinelands Act, N.J.S.A. 13:18-1, L. 1971, c.417, grants more limited land use powers in a Pinelands

Environmental Counsel. Finally, the Coastal Area Facility Review Act, 13:19-1, et seq., L. 1973, c.185, the flood hazard law, 58:16-50 et seq., P.L. 1972, c.185, and the Coastal Wetlands Law, 13:9-1A, et seq., L. 1970, c. 272, gave the State land use power over three ecologically defined communities, i.e. coastal areas, flood plains and wetlands. This kind of curtailment of local zoning power has been flatly upheld by the New Jersey Supreme Court despite Article 4, Sec. 6, par. 2 of the New Jersey Constitution which authorizes the Legislature to provide for local zoning. Hackensack Meadowlands Regional Development Agency v. State, 112 N.J. Super, 89, 103-104 (Chan. Div. 1970) affirmed 63 N.J. 35, 46 (1973). Thus, the Legislature as well as the Judiciary has been moving toward the establishment of policies and controls on a functional and regional rather than local basis. Chief Justice Vanderbilt's comment made 20 years ago about the arbitrariness and invisibility of municipal boundaries, Duffcon Products, Inc. v. Borough of Cresskill, 1 N.J. 509 (1949) rings even more true today. Given judicial and legislative precedent and the realities of the housing situation as this court has described them, Oakwood at Madison v. Township of Madison, 128 N.J. Super. 438, 440-442 (Law. Div. 1974); 117 N.J. Super. 11, 20-21 (Law. Div. 1971), there can be no alternative to denial of this motion for severance and proceeding to trial on plaintiffs' request for regionwide housing remedies.

POINT II

TRIAL CONVENIENCE MANDATES DENIAL OF SEVERANCE IN THIS CASE

Amicus curiae expects that the plaintiffs who will after all be conducting the trial in this case will discuss the issue of trial convenience in their brief. However, we wish to point out briefly the following.

Those passages of the Oakwood at Madison cases cited at the conclusion of the previous argument as well as the earlier mentioned Quinton case and the precedents relied thereon mandate that regional considerations be part of any trial or trials to be conducted in the instant case. These plaintiffs will presumably be presenting and emphasizing considerations of regional need for housing in any evidentiary hearings to be held in this case. Since the cause of action against each town requires the plaintiffs to show that the Township is failing to meet its regional housing obligations, granting of severance would therefore result in the question of regional need being tried 23 different times in 23 separate cases. Plaintiffs can see no reason why this court or the parties in this case should be put to the great inconvenience of 23 proofs on the same issue. Certainly no one will be particularly enlightened by having the same experts testify a multiplicity of times that there is a regional need for housing.

For this very practical reason therefore as well as for the deeper considerations concerning intermunicipal remedies, amicus curiae suggests that this court not grant the motion for severance.

Respectfully submitted,

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