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Brief in Support of Motion for SJ by South River & Jamesburg.

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

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URBAN LEAGUE OF GREATER NEW BRUNSWICK, ET AL)

Plaintiffs,)

VS.) Civil Action

THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, ET AL)

Defendants.)

BRIEF IN SUPPORT OF MOTION

RAFANO AND WOOD
ATTORNEYS FOR DEFENDANTS
BOROUGH OF SOUTH RIVER and
BOROUGH OF JAMESBURG
129 Main Street
South River, New Jersey 08882

Frank Cofone, Jr.
ON THE BRIEF

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STATEMENT OF FACTS

This is an action against all 25 municipalities in Middlesex County seeking relief against alleged economic and racial discrimination in housing arising out of alleged land use policies and practices which effectively prevent plaintiffs from residing in these municipalities.

POINT I
MUNICIPALITIES AS FULLY DEVELOPED AS SOUTH RIVER AND JAMESBURG ARE NOT AFFIRMATIVELY OBLIGATED TO PROVIDE OPPORTUNITIES FOR LOW AND MODERATE COST HOUSING.

A. New Jersey law, as set forth in the Mount Laurel decision, does not impose an obligation on developed municipalities to provide low and moderate cost housing.

Assuming, but not conceding, that the zoning and land use policies of the Boroughs of South River and Jamesburg do not adequately provide housing opportunties for low and moderate income families, it is exceedingly clear that, as fully developed communities, no affirmative or negative obligation is imposed upon them by New Jersey law to rezone established neighborhoods or to plan and provide for such housing. The Mount Laurel decision (South Burlington County, N.A.A.C.P. v. Township of Mount Laurel, 67 N.J. 151, 1975) explicitly and implicitly acknowledges that the imposition of such an obligation on developed as well as undeveloped communities is

"neither practical nor wise" and that "to do so would in all likelihood contribute to neighborhood instability and permit certain property owners and developers to obtain windfalls rather than actually effecting construction of low or moderate income housing." (Concurring opinion of Justice Pashman, p. 218). It is herein submitted that the Mount Laurel decision was intended to comprehensively deal with the question of which municipalities are obligated to provide low and moderate cost housing and to inclusively define the extent of that obligation.

The impact of the Mount Laurel decision is certain to be profound; yet, its mandates should not be unnecessarily extended beyond its intended purpose. Its purported import is to fundamentally contribute to the establishment of the highest American ideals (67 N.J. at p. 221), but its wisdom lies in its recognition that its mandates should be imposed only upon developing communities.

The decision does not gingerly approach the problem, which it describes as a "desperate need for housing in New Jersey" (67 N.J. at p. 158) and a "crisis" (at p. 159). It expressly purports to be a consideration "from a wider viewpoint (than) that effect of Mount Laurel's land use regulation" (at p. 159). Though bold obligations are imposed upon developing municipalities (see summary of the conclusion at p. 187) to provide

for a balanced community, the court refused to follow Justice Pashman's concurring opinion which would impose affirmative obligations upon developed communities as well. Yet even he would impose affirmative and negative obligations upon developed municipalities only "insofar as these obligations can be carried out without grossly disturbing existing neighborhoods." (67 N.J. at p. 218). The majority decision refused to impose even this limited obligation on developed municipalities.

Justice Pashman was bothered by what he called the inequity of absolving developed municipalities of the responsibility for solving housing problems (p. 217); nonetheless, he recognized the resulting gross disturbance and instability if developed communities were imposed with land use obligations similar to undeveloped municipalities (p. 218). He suggested that regional needs be given weight in variance applications. Thus, the obligation of developed communities could be effectuated. Again, his opinion was not accepted by the majority. The majority refused to impose any obligation on developed municipalities.

The Mount Laurel decision was meant to be a practical approach to ameliorate a housing shortage without grossly disturbing developed municipalities. Summarizing its decision, the court at p. 187 stated:

> "As a developing municipality, Mount Laurel 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 desire to live there, of course including those of low and moderate income." (emphasis supplied)

Judicial imposition of new land use obligations would not create realistic housing opportunities for low and moderate income families in already developed municipalities. Only gross disturbances bringing unnecessary instability would result, and thus should be avoided. The Mount Laurel decision implicitly recognizes this and on countless occasions limits its holding to developed municipalities.

That courts are pragmatically approaching the problem of inbalanced communities is apparent from the recent United States Supreme Court Case of Warth v. Seldin, 43 U.S.L. Week 4906 (U.S. June 25, 1975). The allegations of the Complaint and the various association and individual plaintiffs in Warth are almost identical to the instant case. There, as here, the plaintiffs alleged that the zoning ordinance of the Town of Penfield effectively excluded persons of low and moderate income. The Supreme Court adopted a practical, problem solving approach and held that none of these plaintiffs had standing to attack this ordinance. The Court then established the requirements necessary to attack zoning ordinances.

The Court held that the individual plaintiffs, and consequently the class that they represent and the association of which they were members, lacked standing because there was no indication on the record that removing any of the alleged

obstructions would actually benefit the petitioners. At page 13 and 14 of the slip decision the Court said:

> "Here, by their own admission, realization of petitioner's desire to live in Penfield always has depended upon the efforts and willingness of third parties to build low- and moderate-cost housing. The record specifically refers to only two such efforts: that of Penfield Better Homes Corporation, in late 1969, to obtain the rezoning of certain land in Penfield to allow the construction of subsidized cooperative townhouses that could be purchased by persons of moderate income; and a similar effort by O'Brien Homes, Inc. in late 1971. But the record is devoid of any indication that these projects or other like projects, would have satisfied petitioners' needs at prices they could afford, or that were the court to remove the obstructions attributable to respondents, such relief would benefit petitioners."

These same "prudential limitations" should be applied to the instant case to limit the application of the Mount Laurel "balanced community" requirements to developing municipalities. The Supreme Court in Warth, at p. 12 of the slip decision stated:

> "Petitioners must allege facts from which it could be reasonably inferred that absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability of petitioners will be removed. Linda R.S. v. Richard D., supra."

It is respectfully submitted that the approach to achieve balanced communities should be tempered with this kind of prudential pragmaticism. Assuming that plaintiffs are unable

to obtain housing in South River and Jamesburg, if certain of their zoning and land use policies were declared void, the plaintiffs would be in no better position because both municipalities are fully developed. Consequently, there is no substantial probability that they would be able to purchase or lease in South River or Jamesburg if the court affords the relief requested.

In municipalities as fully developed as South River and Jamesburg, it is the absence of vacant land, capable of being developed at low cost which deprives the plaintiffs of housing, not the defendant's zoning land use policies.

Two recent Appellate Court decisions fully support the contention that the Mount Laurel obligations are not imposed upon developed municipalities (Segal Construction Company v. Zoning Board of Adjustment and Mayor and Council of Borough of Wenoah, A-797-73, N.J. Super Ct. App. Div., decided June 25, 1975)., (Pascack Assoc., Ltd. v. Mayor and Council of the Township of Washington, A-3790, N.J. Super Ct. App. Div., decided June 25, 1975).

In Wenoah the court stated that the Borough of Wenoah remained unaffected by the Mount Laurel decision because Wenoah was not one of the developing communities of sizeable land area to which the requirements of Mount Laurel apply. Mount Laurel was composed of 14,000 acres while Wenoah contained 660 acres, of which only 109 acres were vacant.

In Washington the court concluded that the Mount Laurel decision was inapplicable to Washington Township since it was

a small community with only 106 acres available for development and the Mount Laurel decision applied only to municipalities of sizeable land area which remain open to substantial future development.

For the foregoing reasons it is respectfully submitted that the law of New Jersey, as established by the Mount Laurel decision imposes no obligation upon developed municipalities to provide opportunities for low and moderate cost housing.

B. <u>The Boroughs of Jamesburg and South River are such fully developed municipalities</u>.

<u>South River</u>:

The Borough of South River is comprised of 1,587.24 acres of land (compared to 14,000 acres in <u>Mt. Laurel</u>), of which 371.4 acres are presently vacant. Thus, approximately 23% of the land in the Borough is vacant. However, the Borough contains 103 acres of land directly in the path of the Floodway, as delineated by the Department of Environmental Protection, Division of Water Resources, State of New Jersey.

Most of this 103 acres is vacant land and is included in the total of 317.4 acres of vacant land in the Borough (see certification of Peter Tolischus). The regulations of the Department of Environmental Protection, effective June 2, 1975, among other things, prohibit the erection of any new residential structures in the floodways. (see New Jersey Administrative Code, Chapter 18, Sub chapter 1, 7:18-1.4).

Thus, less than 23% of the total area of the Borough of South River is conceivably capable of further development. The vacant residential area consists primarily of small lots scattered throughout the developed sections.

It is thus exceedingly clear that to say that 23% of the Borough is comprised of vacant land is not to say that 23% of its land mass is capable of supporting multi-family dwellings, or even capable at all of being developed. This should be compared to the Town of <u>Mt</u>. Laurel where fully 65% of a 14,00 acre land mass was vacant or in agricultural use.

The land use obligations imposed upon Mt. Laurel should not be imposed upon the Borough of South River, as they were not imposed in Winoah, supra and Washington, supra, because it is a fully developed municipality.

Jamesburg:

Since 1972 the Borough of Jamesburg has received yearly housing reports, prepared for the Borough by E. Eugene Oross Associates, to identify existing housing and related problems. The 1974-1975 reports (copy attached hereto) states at p. 2 that one of the basic problems facing this community with regard to housing is the "very limited vacant land available for new housing construction."

The Borough is comprised of 577 acres of land, of which 122 acres are vacant. Thus, the Borough's vacant land is approximately 21% of its land mass.

The vacant land is situated throughout the Borough as follows:

Zone	Vacant Land by Zone	Total Land by Zone
Residential R-A	50	229
Residential R-B	42	231
Residential R-T	3	15
Business B-1	1	22
Business B-2	7	14
Light Industrial I-1	6	26
Light Industrial I-2	13	40
Total	122	577

42 acres of the 122 acres of vacant land is located in the R-B zone which permits multi-family dwelling upon application to the Board of Adjustment for a special permit.

Thus, Jamesburg is much unlike the sprawling undeveloped community of Mt. Laurel which contains approximately 14,000 acres. Indeed in Winoah, supra, where the municipality contained 109 acres yet to be developed (compared to 122 vacant acres in Jamesburg) the land use obligations imposed on Mt. Laurel were held inapplicable.

Accordingly, it is submitted that Jamesburg is a fully developed municipality and is therefore outside the mandates of the Mt. Laurel decision.

POINT II

PLAINTIFFS LACK STANDING TO ATTACK THE DEFENDANT'S ZONING ORDINANCES

As mentioned earlier, in the recent case of Warth v. Seldin, 43 U. S. L. Week 4906 (U. S. June 25, 1975) the United States Supreme Court, on petition for certiorari, established rules to regulate which individuals and associates had standing to attack zoning ordinances. The circumstances in Warth are almost identical to those presented here; i. e., individuals and associational plaintiffs attacked a zoning ordinance claiming that it effectively excluded persons of low and moderate income. The Complaint alleged that the Town of Penfield made impossible the construction of homes for low and moderate income families.

The Court assumed the truth of the allegations in the Complaint and analyzed the status of each plaintiff for the purpose of deciding which ones had standing to attack the ordinance. It decided that none of these plaintiffs was qualified to attack this set of zoning ordinances.

Warth involved five different kinds of plaintiffs. For our purposes it will be necessary to discuss the Court's holding only as it concerned those plaintiffs in Warth whose position is similar to the position of the plaintiffs in the instant case.

Two sets of individual plaintiffs alleged harm by the Township of Penfield. One group asserted that Penfield's exclusionary practices forced the City of Rochester, where they were property owners and taxpayers, to impose higher taxes. A similar group is not present in the instant case.

Another group asserted that they were members of low and moderate income families who, by reason of the defendant's zoning ordinance, were prevented from acquiring residential property in Penfield by lease or purchase and were thus forced to live in less attractive neighborhoods. One member of this group claimed a commuting expense and all alleged how their lives would be improved had residence in Penfield been possible (see notes 13 and 14 on page 11. All references shall be to the "slip decision").

This latter group is of course identical to the one in the instant case and the harm and causes of harm alleged here are similar in nature. These plaintiffs lacked standing because they were unable to show that:

> "it could reasonably be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield and that if the court affords the relief requested, the asserted inability of petitioners will be removed" (page 12)

The Court did not accept this group's claim that enforcement of the ordinance against builders and developers precluded the construction of low and moderate income housing because there was no showing of a willingness on the part of these third parties to build low and moderate cost housing.

The record showed only two attempts (see page 13) to build homes for persons of moderate income, one in 1969 and one in 1971, but the Court said at page 14:

> "the record is devoid of any indication that these projects, or other like projects, would have satisfied petitioners' needs at prices they could afford, or that, were the court to remove the obstructions attributable to respondents, such relief would benefit petitioners."

Indeed the Court noted that the description of the economic position and housing needs of these plaintiffs, which are similar to those of the plaintiffs in the instant case, suggests that the housing which these developers proposed would not be suitable for them.

Thus, there was no causal relation in Warth, as there is none here, between zoning practices and the inability of the plaintiffs to obtain housing. The economic position of the plaintiffs in Warth and here combines with the unwillingness of builders or developers to provide low and moderate cost housing to deprive plaintiffs.

In the Borough of South River, only one request was made since 1970 to amend the zoning ordinances to facilitate

multifamily structures. In 1974 Lurline Associates requested that a portion of the area zoned for Industrial use be amended to allow multi-family residential use. The Planning Board advised it to apply for a variance. The variance application, heard by the Board sometime in August 1975, was entirely different than the proposed purpose for requesting the ordinance amendment, in that it now sought to build single family homes which it estimated would cost approximately $55,000.00. Such costs are well beyond the means of low income family groups and may be beyond the reach of most moderate income family groups. (See Answer to Interrogatory No. 10, a copy of which is attached hereto and Certification of Kathleen Riley.)

Since 1970 only eight applications for multi-family structures have been filed in the Borough of South River. Four of these were granted (store to four-unit apartment; 54-unit garden apartment approved; 60-unit garden apartment approved; residence for men and women granted) and four applications were denied (convert four bedrooms for rental; 28 efficiency units denied; convert factory to three-room apartments denied; change Light-Industrial zone to a General Commercial). See Answers to Interrogatory No. 11, attached hereto.

Of the four variance requests denied in the past five years, only two conceivably could have assisted the plaintiffs, and whether they actually would have done so is entirely a matter for speculation. Of these two, only one, the request for a change of use variance to build on 38 acres, filed on March 31, 1975, conceivably remains a viable project (see page 25 of majority opinion in Warth). Parec Construction has also applied for a variance for the purpose of building garden apartments. The application is still before the Board for consideration.

There appears to be no indication that any of the projects could or would provide low or moderate cost housing and, consequently, there is no indication that but for the alleged exclusionary practices, the plaintiffs would be able to reside in South River.

Under identical circumstances in Warth, the Court couched its decision in the threshold requirement of "standing" which it declared involved constitutional limitations and stated that "it (standing) is founded in concern about the proper, and properly limited-role of the courts in a democratic society" (page 6). We suggest that, as to the defendants, Borough of South River and Jamesburg, the plaintiffs may not only lack "standing", but also that they have failed to set forth facts to make out a cause of

action, since their inability to reside in either Borough is a result of a combination of the dearth, in both Boroughs, of vacant land capable of being developed at low or moderate cost, the unwillingness of developers to build low or moderate cost dwellings, and the plaintiffs' economic condition. There is no indication here, as in Warth, that absent the alleged exclusionary practices plaintiffs would reside in either Borough.

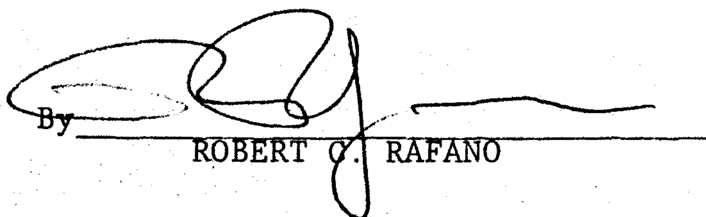
Though the Warth decision may be construed to be limited to federal courts, there is really no good reason to do so.

In conclusion, it is respectfully submitted that the Warth decision supports the defendants position that plaintiffs have not set forth allegations necessary to support a cause of action (since this is a motion for summary judgment rather than a motion to dismiss the Complaint, defendants concede that appropriate certifications may be used to supplement the allegations of the Complaint). It is further submitted that the plaintiffs have not met the threshold requirements of standing to attack the zoning and land use policies of the Boroughs of South River and Jamesburg which are based upon either state or federal grounds.

CONCLUSION

For the foregoing reasons it is submitted that no issues of genuine fact exist and that the defendants The Boroughs of South River and Jamesburg are entitled to a summary judgment as a matter of law.

RAFANO AND WOOD



By ______________________
ROBERT C. RAFANO