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- Brief on Behalf of Township of Piscataway and Borough of South Plainfield Dealing with Fair Share Allocation
- Cover letter to Judge

Pgs. 35

Pl. 1318

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Piscataway & So. Plainfield
~~Mod Brief~~
Fair Share

SACHAR, BERNSTEIN, ROTHBERG, SIKORA & MONGELLO
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

CA001051B

EDWARD SACHAR
LIBBY E. SACHAR
HARRY E. BERNSTEIN
LEONARD S. SACHAR
DANIEL S. BERNSTEIN
DAVID H. ROTHBERG
FREDERICK J. SIKORA
NICOLAS F. MONGELLO
BARRY M. HOFFMAN
VINCENT L. STRIPTO

P. O. BOX 1148
700 PARK AVENUE
PLAINFIELD, NEW JERSEY 07061

201-757-8800

April 15, 1976

Honorable David D. Furman
Douglas Road
Far Hills, New Jersey 07931

Re: Urban League of Greater New Brunswick, et al -vs- The Mayor and Council of the Borough of Carteret, et als
Docket No. C-4122-73

Dear Judge Furman:

Enclosed please find an original and one copy of a Brief submitted on behalf of the Township of Piscataway and the Borough of South Plainfield which deals with fair share allocation. This Brief is being submitted jointly by myself and Sanford Chernin, Esquire.

Respectfully,

Daniel S Bernstein

DSB cm
Encs.

DANIEL S. BERNSTEIN
For the Firm

CC Baumgart & Ben-Asher, Esquires (with enc.)
Attorneys for Plaintiffs
Sanford Chernin, Esquire (with enc.)
Attorney for Borough of South Plainfield

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

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al,

Plaintiffs,

-vs-

Civil Action

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

Defendants.

BRIEF ON BEHALF OF TOWNSHIP OF PISCATAWAY AND BOROUGH OF SOUTH PLAINFIELD DEALING WITH FAIR SHARE ALLOCATION

SACHAR, BERNSTEIN, ROTHBERG,
SIKORA & MONGELLO, P.A.
P. O. Box 1148, 700 Park Avenue
Plainfield, New Jersey 07061
Attorneys for Defendant, Township of Piscataway

DANIEL S. BERNSTEIN
On the Brief

STATEMENT OF FACTS

A. The Court cannot consider the plaintiffs' Appendix A, Part II; Appendix C; and Appendix F.

The plaintiffs have attempted to introduce new evidence to the Court through the inclusion of factual matter along with their Post-Trial Brief. The attempted introduction of this evidence is obviously improper since it is not subject to cross-examination. In Appendix A, Part II, there is discussion of Mallach's fair share allocation plan. Had the plaintiffs wished to introduce this plan, the proper procedure would have been for Mallach to testify about the same on direct examination and then be subject to cross-examination. However, this was not done.

When depositions were taken of Mallach, plaintiffs' counsel represented that he would not testify on a fair share allocation plan. Thus, to allow Mallach's plan after the trial has been completed would be highly improper.

The author of this Brief attempted to cross-examine Ernest Erber on the basis of other fair share allocation plans. The plaintiffs' counsel objected to this and the objection was sustained. Thus, cross-examination was precluded on Erber's view of other fair share plans.

By introducing Appendix C, the plaintiffs are attempting to place in evidence the operations of various federal programs. Any programs which Mallach has testified to are already part of the evidence.

However, the attempt to introduce additional evidence on the federal programs by way of Appendix C should be disregarded by the Court.

In Appendix F, the plaintiffs are attempting to place before the Court a H.U.D. bulletin. Since this bulletin is not subject to cross-examination and was not submitted at the trial, it should not be considered by the Court.

B. The Court should weigh the evidence which was submitted by the plaintiffs.

Throughout the trial, and as the last section of the Brief indicates, even after the trial, the plaintiffs have introduced into evidence piles of documentation of limited value. The Court admitted most of the evidence and held that the objections would go to the weight of the evidence. The Court must now determine how material the evidence is.

In P-56, Erber compared Middlesex County with Hudson, Essex, and Union Counties. Obviously, Middlesex County would be less urbanized than these counties which are closer to New York City. A fairer comparison would have been between Middlesex County and Morris, Somerset, and Monmouth Counties, but the plaintiffs decided against this type of comparison.

P-59, as well as the other exhibits the plaintiffs introduced into evidence, gave traffic counts for roads in Middlesex County. What

revelance does the increase in traffic on Middlesex County roads have with the present suit? The plaintiffs could not even show where the traffic originated or whether it was intra-county.

One of the most absurd exhibits which the plaintiffs proposed is P-64. In it, the plaintiffs compared new marriages with residential building starts. Are the plaintiffs implying that every newly wed couple is entitled to a new home?

These exhibits are only given as representative examples. It is urged that the Court scrutinize the foregoing exhibits as well as the others which were submitted in order to determine what materiality, if any, they possess.

While innumberable exhibits were introduced into evidence by the plaintiffs, most of the authors of the exhibits were not produced. Thus, the census representative was not familiar with the information contained in the documents which he brought to Court. In the words of one of the defense counsel, Dr. Floyd Lapp was merely the "errand boy" and bringing Tri-State exhibits to the Court. All Tri-State exhibits were placed in evidence as apparent official records, thus precluding cross-examination of the contents by defense counsel. Dr. Lapp was not even queried by plaintiffs on the documents which he had prepared. Richard Ginsman brought the pamphlet of the New Jersey Department of Community Affairs, "An Analysis of Low-and Moderate-Income Housing

Need in New Jersey". Douglas Powell, the Middlesex County Planner, brought to Court numerous County documents which were introduced into evidence. However, Powell was not the principal author of any of the documents.

By placing innumerable documents in evidence as apparent official records, the plaintiffs precluded cross-examination on the contents. At one point, the author of this Brief cross-examined Dr. Lapp about the Tri-State Journey to Work statistics. Dr. Lapp could not answer the questions and the plaintiffs contended that Ernest Erber would explain the meaning of all the documents. This Brief asks whether the documents were explained by Erber to the Court's satisfaction.

It appears to the author of this Brief that none of the plaintiffs' witnesses satisfactorily explained the meaning of the documents which were introduced into evidence. If the Court were to draw its conclusions from the unexplained documents placed in evidence, then the whole trial was moot. The trial Judge and his Clerk could have visited the Rutgers' Plainning Library and obtained the same information.

The plaintiffs assume that they have proven the need for a fair share allocation plan and only the construction of that plan is now in issue. That is not the case. The weight of the evidence does not support the imposition of the County wide fair share allocation plan.

C. The Journey to Work studies prove that Middlesex County has not been exclusionary.

A principal tool of exclusionary zoning is overzoning for industrial and commercial facilities and underzoning for residences. The reason municipalities do this is because commercial and industrial facilities produce tax revenue while residences usually produce a tax loss. That is, non-residential establishments generally pay more in municipal taxes than they require in municipal services while the opposite is true of residences.

All of the witnesses in the present case seem to indicate that workers should be given the opportunity to live near their jobs.

The plaintiffs claim that Middlesex County has insufficient housing. In an attempt to buttress this hypothesis, they introduced into evidence excerpts from Tri-State Journey to Work studies. In order to give the Court a complete picture, the defendant, Piscataway Township, introduced into evidence the complete Tri-State studies.

All of these studies which were done by Tri-State indicate that there are substantially less workers working in Middlesex County than there were workers living in Middlesex County. On the testimony which was adduced, this would show that the County is non-exclusionary. However, the plaintiffs' witness, Erber, prepared Exhibit P-66 which showed that the rate of growth for worker in-commuters in Middlesex

County exceeded the rate of growth for worker out-commuters between 1960 and 1970. Erber computed these results by taking the 1960 and 1970 Tri-State statistics. However, on cross-examination by this author, Erber admitted, after reading portions of the entire Tri-State study, that the 1960 and 1970 figures were not comparable. They were not comparable for the following reasons:

1. In 1960, neither Somerset County, Monmouth County, nor Middlesex County were S. M. S. A.'s. Therefore, the 1960 study showed no statistics for workers commuting between the aforementioned counties.

2. The 1960 study included all secondary jobs while the 1970 study did not.

3. In the 1960 study, workers who were absent when the statistics were taken were not included in the computations. In 1970, workers who were absent were included in the statistics.

4. The 1960 study did not include workers who lived in the Tri-State area, but worked out of the region. The 1970 study included these workers.

In an attempt to correct the false impression given by P-66, there is below a comparison of the 1963 Tri-State statistics with those of 1970. Attached to this Brief is a copy of the 1963 Journey to Work

statistics prepared by Tri-State, which excerpt was taken from a Tri-State study which was introduced into evidence by Piscataway Township. It should be noted that there is a great deal of disparity between the 1960 and 1963 figures. The 1960 figures show that Middlesex County had 128,700 resident workers living within its borders, while the comparable figure in the 1963 study is 171,400 workers. This increase is due to more than the population growth of Middlesex County during the period. It is due to the correction of the inadequacies in the 1960 study by the improved methods used in the 1963 study. The 1963 study not only showed the relationship of workers commuting between Somerset, Monmouth and Middlesex Counties, but also included workers living out of the region and also included workers who were absent when the survey was taken. A look at the comparison of the 1963 and 1970 statistics shows that out-commuters from Middlesex County grew at a rate of 42% while in-commuters into Middlesex County grew at a rate of only 31%. Thus, not only the absolute figures show that Middlesex County is non-exclusionary, but the trend is also in that direction. One additional factor should be added when analyzing the statistics. According to Douglas Powell, Middlesex County Planner, most of the residents in Middlesex County are blue collar workers. This type of worker produces far less tax revenue than the more affluent white collar and professional workers, who generally live in more affluent housing. Thus, the Journey to Work

statistics are biased against Middlesex County. This would be true of the statistics produced in this Brief as well as those in P-66.

If P-66 has any negative meaning for the defendants in the present case, then the table which is produced below indicates just the opposite result.

WHERE MIDDLESEX COUNTY'S RESIDENT LABOR FORCE WORKED IN 1960 AND 1970

	1963	1970	Change	Percent
Total - Resident Labor Force	171,000	234,000	63,000	37%
Employed in Middlesex County	111,000	149,000	38,000	34%
Employed outside Middlesex County	60,000	85,000	25,000	42%

WHERE MIDDLESEX COUNTY'S EMPLOYED WORK FORCE LIVES

	1963	1970	Change	Percent
Total Employed in Work Force	153,000	204,000	51,000	33%
Live in Middlesex County	111,000	149,000	38,000	34%
Commute to Middlesex County Jobs	42,000	55,000	13,000	31%

Based on 1963 and 1970 Tri-State Statistics.

All figures rounded off to nearest thousand.

D. The plaintiffs' failure to do any field work should preclude the imposition of a county-wide fair share allocation plan.

The author of this Brief has been involved in numerous suits involving zoning and planning. This suit is probably the most significant one. Yet, amazingly enough, this is the only litigation where no field work was done by any of the plaintiffs' witnesses. Dr. Mann merely gave a general exposition of exclusionary zoning. Allan Mallach looked at each of the defendant municipalities' zoning ordinances. Ernest Erber constructed a mathematical monstrosity based upon statistics prepared by others. Even Douglas Powell did not testify as to any work which he personally performed. His testimony was based on studies either prepared by others for the County Planning Board, or prepared by his subordinates.

The plaintiffs are seeking the imposition of a county-wide allocation scheme. They can point to no precedent for this remedy. The Court should have hard evidence before embarking upon such a task. Such evidence was not presented in the case at bar.

E. The plaintiffs cannot predicate need on the Department of Community Affairs' study, "An Analysis of Low-and Moderate-Income Housing Need in New Jersey".

Richard Ginsman of the Department of Community Affairs presented the DCA/study to the Court. He had not prepared the report. Never-

theless, he testified that the Department of Community Affairs did not consider the Analysis to be a fair share allocation scheme. A mere glance at the report indicates why it is not an allocation plan. For Middlesex County, the two municipalities having the largest needs are shown to be New Brunswick and Perth Amboy. These are the only two communities that were not made defendants to the present action and it would be admitted by all parties that these two communities have the largest numbers of low income citizens. All that the study illustrates is the number of moderate income citizens within a community. Therefore, under the DCA formulation, the affluent communities in Morris and Somerset Counties show an extremely miniscule housing need. As representative examples in Morris County, Harding Township is shown to have a housing need of 38 homes, Mendham Township is said to have a need for 72 units and the amount for Mendham Borough is said to be 61 units. For Somerset County, the need is established as 68 units for Bedminster, 191 for Bernards, 64 for Peapack-Gladstone, 231 for Warren, and 90 for Watchung. Can it rationally be stated that all of the foregoing affluent communities require less new low and moderate income housing units than New Brunswick? The answer is obviously no.

On pages 6 through 8 of the plaintiffs' Brief, they argue that the existence of substantial low and moderate income persons in Middlesex County does not prove non-exclusion, because of the existence of

substandard housing and housing which costs more than 25% of the low income families' income. In effect, the plaintiffs are refusing to give any credit to any municipality in Middlesex County, other than Perth Amboy and New Brunswick. Why they are giving credit is not explained, as is their absence from the present case, since the DCA study shows them to have the highest need in the entire County. The obvious answer to the plaintiffs' assertions is that there is no housing which can be either constructed or rented to low income citizens in the central and northern part of New Jersey. This is admitted by the plaintiffs on page 29 of their Brief where they state:

> "...most families within the low and moderate income category require subsidies to afford standard housing...".

Since the type of housing which the plaintiffs wish existed is nowhere present, why chide the 23 defendant municipalities for not having it?

There is an even more serious deficiency in the DCA study. The existence of dilapidated and deteriorated housing was not computed on the basis of actual housing within the municipalities of New Jersey. Pages 2 and 3 of the study indicate that it was estimated on the basis of computerized formula which took into account such factors as "concentrations of low income households, unemployment and overcrowding of units." Thus, where low income and unemployed persons live, there is a presumption that substandard housing exists. Based on the formula, when

unemployment decreases, then the number of substandard housing units would also decrease. It would be grossly unfair to allocate low income families based on such formulations, especially when they have not been adequately explained to the Court.

F. The Court should not direct the defendant municipalities to expend funds for housing.

It was unclear, at least to the author of this Brief, as to whether or not the plaintiffs were seeking an expenditure of funds by the defendant municipalities. That question is now answered in the affirmative on page 42 of the plaintiffs' Brief. However, there was absolutely no evidence as to where that money would come from. It is common knowledge that municipalities in New Jersey are having severe problems balancing their budgets. Rising costs for schools, municipal employees, welfare, and other services are not being balanced by similar increases in tax revenue. None of this was disputed by any of the plaintiffs' witnesses. The obvious question arises, in view of the local fiscal problems, as to where municipalities are to obtain funds for housing. The plaintiffs did not address themselves to this question. Therefore, they are precluded from raising it at this juncture of the case.

G. The 20 municipalities in Middlesex County participating in the Urban County Program have a total new housing need for low and moderate income citizens of approximately 5,500 units by 1978.

Ernest Erber had no idea how many new low and moderate income housing units should be built in Middlesex County. Neither he nor Douglas Powell had any idea how many low and moderate income housing units were already in existence in Middlesex County. However, Powell estimated that there was a need for 11,000 new units for the entire County by the year 1978 and a need for 5,500 units for the 20 urban county municipalities. These figures are far different than the 48,000 to 75,000 new units which are bantered about on page 24 of the plaintiffs' Brief. What the Court should be addressing itself to is not the total need, but the need for new units in the defendant municipalities.

At this juncture, the Court is referred to Piscataway's prior Brief dealing with its special features. The Brief makes reference to the garden apartment zone, which, when it is changed to allow a density of 15 units to the acre, will allow the construction of between 285 and 357 new apartment units. Furthermore, the zoning of 100 acres for a PRD would allow an additional 1,000 moderate income dwelling units to be built. Added to this should be the efforts of the Senior Citizen Housing Authority to construct 300 to 400 subsidized units. Furthermore, there is existing vacant acreage which permits the construction of one-family homes on 5,000, 7,500, and 10,000 square foot lots. If all of the aforementioned is taken into account, Piscataway is already providing (assuming the changes suggested in the initial Brief are implemented)

more than 2,000 units of modestly priced housing. If the Court would aggregate the figures for all of the defendant municipalities, with the changes which have already been proposed, then it is submitted that well over 5,500 new dwelling units will be provided in the 20 urban county municipalities.

H. There has been no proof that low income housing can be built.

Amazingly absent from the plaintiffs' proofs was any evidence of the possibility of constructing low income housing in Middlesex County. Not a single figure was given as to what it would cost to build a single-family home on a small lot or a high-density apartment project. There is a strong possibility that the plaintiffs may be "tilting at windmills", and that even if land is appropriately zoned, no low income housing will be built. Indeed, the quote on page 29 of the plaintiffs' Brief which was previously reproduced indicates that most low and moderate income housing will have to be subsidized. Therefore, what real difference will it make if the defendant municipalities down zone their residential land, if no low income housing is built?

LEGAL ARGUMENT

POINT I

PISCATAWAY TOWNSHIP AND THE BOROUGH OF SOUTH PLAINFIELD ARE NOT WITHIN A HOUSING REGION WHICH IS COMPOSED OF MIDDLESEX COUNTY

In order to implement a fair share allocation plan, the plaintiffs have to establish a region. Throughout the trial, they opted for Middlesex County, largely on the basis that it was easiest to work with. However, there was a large amount of testimony that the housing region for many of the defendant municipalities was definitely not coterminous with the County boundary. The plaintiffs Tippett and Benson both testified that they looked outside of the County for housing. Benson stated that he looked in both Somerset and Union Counties for housing before settling in Piscataway.

Realtor Eodice testified that Plainfield has a substantial influence on the real estate market of Piscataway. Planner Carr testified that Piscataway was in a region which encompassed Plainfield. South Plainfield produced professional planner, Harvey Moskowitz, who argued that it was improper to place South Plainfield in a Middlesex County region. He also said that it was impossible to tell where South Plainfield stopped and where adjoining Plainfield began. It is evident that Plainfield has a larger influence on both Piscataway and South Plainfield than either New Brunswick or Perth Amboy. Yet the influence of Plainfield was not taken

into account by the plaintiffs.

The author of this Brief as well as another attorney representing a defendant municipality introduced into evidence a 1964 study which was prepared by the Department of Conservation and Economic Development. Ginsman testified that that Department was a predecessor to the Department of Community Affairs. He also said that the study was still relevant in 1976. That study set up various planning regions and sub-regions throughout New Jersey. South Plainfield and Piscataway were placed in a region which included Plainfield, Green Brook, Warren, and Watchung. It is submitted that the DCA region is more appropriate for Piscataway and South Plainfield than Middlesex County.

The plaintiffs have the burden of establishing a region for each of the defendant municipalities. The plaintiffs' problem is that Piscataway and South Plainfield are in a different region than Cranbury and South Brunswick. However, in the interests of expediency, the plaintiffs lumped all of the defendant municipalities together. In doing this, they failed to prove the applicable region for each defendant municipality. Therefore, the Court cannot impose a fair share scheme since it does not have an appropriate region for each defendant municipality. The plaintiffs can argue that this would be an onerous task, but it was their decision to challenge 23 defendant municipalities rather than one or two municipalities.

In the leading case of Southern Burlington County NAACP v. Township of Mount Laurel, 67 N.J. 151, 162 (1975), the region for Mount Laurel was said to be "...those portions of Camden, Burlington and Gloucester Counties within a semi-circle having a radius of 20 miles or so from the heart of Camden City." A 25 mile radius from Camden was said to be the region in Camden National Realty v. Township of Cinnaminson, Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-37016-73 (1975).

In the leading case of Oakwood at Madison v. Township of Madison, 117 N.J. Super 11 (L. D. 1971), cert. granted, 62 N.J. 185 (1972), on remand, 128 N.J. Super 428, 441 (L. D. 1974), the court made the following comments on the Madison Township region:

> "Some preliminary classifications may be appropriate. The region, the housing needs of which must be reasonably provided for by Madison Township, is in the view of this Court, not co-extensive 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 invalidly exclusionary zoning."

Using this criterion, Piscataway and South Plainfield do not fit into a Middlesex County region.

Solely on the basis of the plaintiffs' failure to establish a region, a county-wide fair share allocation program cannot be ordered.

POINT II

MUNICIPALITIES IN NEW JERSEY ARE UNDER NO OBLIGATION TO CONSTRUCT LOW AND MODERATE INCOME HOUSING

The lower court in the Mount Laurel case directed the defendant municipality to implement an affirmative action plan for providing low and moderate income housing. However, the New Jersey Supreme Court did not accept this remedy.

Justice Hall recognized:

> "Courts do not build housing nor do municipalities. That function is performed by private builders, various kinds of associations, or, for public housing, by special agencies created for that purpose at various levels of government. The municipal function is initially to provide the opportunity through appropriate land use regulations and we have spelled out what Mount Laurel must do in that regard." p. 192.

As to the remedy, the court ordered:

> "As outlined at the onset of this opinion, the trial court invalidated the zoning ordinance in toto and ordered the township to make certain studies and investigations and to present to the court a plan of affirmative public action designed 'to enable and encourage the satisfaction of the indicated needs' for township related low and moderate income housing. Jurisdiction was retained for judicial consideration and approval of such a plan and for the entry of a final order requiring its implementation.
>
> We are of the view that the trial court's judgment should be modified in certain respects. We see no reason why the entire zoning ordinance should be nullified. Therefore we declare it to be invalid only to the extent and in the particulars set forth in this opinion. The township is granted 90 days from the date hereof, or such additional time as the trial court may find it

reasonable and necessary to allow, to adopt amendments to correct the deficiencies herein specified. It is the local function and responsibility, in the first instance at least, rather than the court's, to decide on the details of the same within the guidelines we have laid down. If plaintiffs desire to attack such amendments, they may do so by supplemental complaint filed in this cause within 30 days of the final adoption of the amendments." p. 191.

POINT III

THIS COURT SHOULD NOT "BAIL OUT" THE PLAINTIFFS BY SEEKING ADDITIONAL TESTIMONY AND IMPOSING ITS OWN FAIR SHARE PLAN

At the prodding of defense counsel, the plaintiffs produced Erber's fair share plan which was distributed to the attorneys for the defendant municipalities in January of 1976. Some of the mathematical computations were changed prior to trial, but the plan remained essentially the same. It was obviously deficient in a number of areas, some of which were:

a. It contained 1970 base figures despite the fact that the trial was held in 1976.

b. The plan started from the DCA study despite the fact that that document was not intended as a fair share allocation plan and despite the fact that that plan would preserve existing densities.

c. The basis of Erber's plan is the DCA study which defines low and moderate income families as having incomes of less than $8, 567.00 per year, as of 1970. Yet Erber states that one-third of the County residents had low or moderate incomes as of 1970, based on a yearly income of $10,000.00, or less.

d. Erber bases the vacant land allocation on 1970 statistics despite the fact that most of the defendant municipalities gave updated figures in the answers to Interrogatories.

e. Dr. Lapp testified that it would take six experts to prepare a fair share allocation program. Factors which these experts would take into account would include the existing population, the availability of land, the number of units per acre, the number of jobs per acre, the existence of low income persons within the municipality as well as ecological factors. Many of these factors were never even testified to by the plaintiffs.

f. Mallach stated that a municipality must have the proper infrastructure before a substantial number of low and moderate income dwelling units could be constructed. There was no testimony on the infrastructure of any of the defendant municipalities.

g. Erber contended that Middlesex County was responsible for all of the moderate income employees who lived outside the County, but were working in Middlesex County. Yet, Erber refused to give Middlesex County credit for those low income workers who resided in the County and were working elsewhere.

h. Erber did no original work with regard to devising his own fair share scheme, but merely worked on figures which were supplied by others.

i. Erber did not take into account any of the unique features of the defendant municipalities.

It is obvious that the Erber fair share allocation plan does not make any sense. That is the reason why the plaintiffs are seeking a "bail out"; they want the Court to devise its own allocation plan. Requests by the plaintiffs are made on pages 17, 19, 20, 22, and 26 of their Brief for the Court to devise a plan. However, that is the plaintiffs' job and they have failed miserably. Furthermore, they have not given the factual basis on which a rational plan could be devised.

The plaintiffs' Brief is rich in civil rights and school desegregation cases. However, the only zoning case which they claim gives the Court the right to direct affirmative relief is Pascack Assn. v. Mayor and Council of Tp. of Washington, 131 N.J. Super 195 (L. D. 1974), reversed Superior Court of New Jersey, Appellate Division, Docket No. A-3790-72 (1975). The plaintiffs also cited this case on numerous instances during oral argument at the trial of the present matter. In the Washington Township case, the trial judge found the zoning ordinance of Washington Township to be exclusionary because it did not provide for apartments. While the municipality amended its ordinance to provide for apartments,

the court found that the rezoning was not done in good faith and that the zoning amendment would not lead to the construction of multi-family dwellings. The municipality was given additional time to prepare a reasonable zoning amendment pertaining to apartments. When the town again failed to act, the court then appointed two Rutgers professors to make their recommendations. In the Washington Township case, the court appointed the impartial experts after the defendant municipality had twice failed to comply with the court's order; and that particular decision was reversed by the Appellate Division. The plaintiffs in the present matter would have the Court assume that the 23 defendant municipalities will not comply with an order of the Court. This assumption cannot be made.

There is an additional difference between the Washington Township case and the present matter. In the Washington Township case, the plaintiffs had proven that the ordinance was exclusionary. In the present matter, the plaintiffs are seeking a fair share housing formulation. Unlike the plaintiffs in Washington Township, they have not proven their case. Therefore, it would be improper for the Court to intervene.

POINT IV

THE DEFENDANT MUNICIPALITIES SHOULD NOT BE REQUIRED TO APPLY FOR FEDERAL HOUSING PROGRAMS

At the trial, Mallach testified that there were a number of federal housing programs which were available to the defendant municipalities. An Appendix to the plaintiffs' Brief listed additional programs. The defendant municipalities should not be required to apply for these programs. The plaintiffs only gave a sketchy description of the federal programs. They did not deal with the following issues:

a. The cost of applying for the aforesaid programs in terms of both money and manpower.

b. The total amount of money which is in each federal program.

c. The likelihood of any municipality in Middlesex County obtaining any federal funds.

d. The continuing municipal resources which must be devoted to the programs.

e. Continuing municipal expenses which will be incurred as a result of each program.

f. The percentage of funds for each program which must come from the municipality.

g. The percentage of funds for each program which must come from private property owners.

The plaintiffs spoke in generalities about the federal programs, but never got down to specifics.

Mallach was more candid when he wrote "The Housing Crisis in New Jersey, 1970", which is already in evidence. The following is an excerpt of his views. None of his testimony at the trial contradicts any of these observations.

> "Finally, attempts to solve the housing crisis through the private market have suffered as well from widespread lack of interest. In the State of New Jersey there is at present only one builder/developer firm that has shown more than a sporadic and occasional willingness to participate in programs such as Rent Supplement or 221 (d) 3 middle-income housing." p. 92, 93.
>
> "The failure of housing development corporations to produce housing in volume is not surprising, since, despite the rationality of their structure, it in no way significantly affects the basic obstacles that have hindered all other attempts, which include:
>
> 1. The serious lack of supply of genuinely competent housing specialists capable of developing housing in a complex urban setting.
> 2. The absence of resources for the construction and maintenance of low or middle income housing, primarily low income housing.
> 3. The innumerable complications which confront any organization attempting to deal with a multiplicity of federal, state, and local, housing programs." p. 97.
>
> "Finally, resources for subsidized programs tends to be so limited, that volume production of low and low-middle income housing is often not possible with even the best will and talent. For example, the appropriation for interest reduction payments under both sections 235 and 236 for fiscal 1969 was $7 million, which is capable, roughly, of supporting interest reduction for 10,000 units. Since the number of units in need of re-

placement presently inhabited by low and middle income families in Newark alone is over 40,000, it is clear that no genuine volume program possible (possibly) be initiated by any organization - it is equally evident that one could not build housing in volume in Newark without subsidy, which would rent over $45/room/month, and provide any benefit for the families in need of housing." p. 97, 98.

"Public housing has many features making it unattractive to low-income families. The atmosphere of the projects; the absence of amenities; the oppressive appearance of many, particularly large-city housing projects; and rigid rules and unsympathetic management by some housing authorities all contribute to this attitude. The housing authorities themselves, limited by inadequate construction cost allowances; seeing public housing turn into a ghetto for multi-problem families; and finding operating expenses rising beyond the level which can be supported by reasonable rents, are understandably reluctant to construct additional public housing." p. 105.

"Although the urban renewal program was originally conceived as a housing program largely designed to make urban land available for the construction of low and middle-income housing, it has had the opposite effect...". p. 113.

POINT V

THERE IS NO LEGAL PRECEDENT FOR REQUIRING THE DEFENDANT MUNICIPALITIES TO EITHER SPEND FUNDS ON HOUSING OR TO APPLY FOR FEDERAL PROGRAMS

In the case of Schuschel v. Volpe, 84 N.J. Super 391 (App. Div. 1964), the third party plaintiff Hasbrouck Heights requested an order directing the New Jersey State Highway Commissioner to maintain, repair and clean drainage facilities. This request was denied prior to trial on two grounds. The first was that the State was protected by sovereign immunity.

As to the second ground, the court held:

> "We lay aside the fact that the complaint seeks a judgment 'commanding' the Commissioner 'to reconstruct the West Riser Ditch'--clearly not a ministerial act. The statutes mentioned in the borough's complaint (R. S. 27:7-18 and 21) do not require the Commissioner to keep culverts clean or to maintain proper drainage in lands abutting upon highways. We know of no statute which specifically requires him to do so. He may act to 'prevent water from coming in contact with and damaging a state highway' (R. S. 27:7-41), but we know of no statute which requires him to act with reference to drainage of adjacent property.
>
> In short, cleaning culverts and maintaining ditches is not a ministerial duty. Cf. Case v. Daniel C. Mc Guire, Inc., 53 N.J. Super 494, 498 (Ch. Div. 1959). Assuming that good management would indicate that such cleaning should be done, it would have to be done by and at the expense of the State. If the State chooses not to clean culverts, it may not be compelled to do so, and neither may the Commissioner." p. 395.

A similar ruling was made by the court in Wayne Township v. County of Passaic, 125 N.J. Super 546 (L. D. 1973) modified on other grounds, 132 N.J. Super 42 (App. Div. 1974). There the court held:

> "Since the county board exercises a discretionary authority, matters of public road improvements are generally beyond judicial cognizance:
>
> 'The wisdom of making public improvements is not a matter for judicial investigation, and the courts will not intervene in the proceedings to bring about a public improvement in the absence of fraud or patent illegality.' (Paramus v. Bergen County, 25 N.J. 492, 496 (1958)
>
> Likewise, the manner of the exercise of such discretion is ordinarily beyond judicial review in a proceeding in lieu of prerogative writs:
>
> 'So long as (a public body) operates within the orbit of its statutory authority, it is well established that the courts will not interfere with the manner in which it exercises its power in the absence of bad faith, fraud, corruption, manifest oppression or palpable abuse of discretion. (Newark v. N.J. Turnpike Authority, 7 N.J. 377, 381-382 (1951))' "
>
> "Accordingly, to the extent that the complaint of John Mazzacca et als. seeks to compel improvement of Riverview Drive by order of the court, such relief is beyond the power of the court, absent a showing of fraud, illegality, or palpable abuse of discretion."
> p. 552, 553.

The plaintiffs in their Brief cited one case* as standing for the proposition that a court can require a municipality to expend funds in certain situations. The plaintiffs wisely chose not to go into the factual situation presented by that case. There, the defendant Parish subverted a parish public school system by supporting a private school which was solely attended by white students. In that situation, it was

*Plaquemines Parish School Board v. United States, 415 F. 2d 817 (5th Cir. 1969)

obviously proper for the court to require the proper financing of the public school. Furthermore, in Plaquemines, the trial court directed the defendant school board to apply for financial aid from the federal government. This portion of the lower court judgment was reversed by the Fifth Circuit of the Court of Appeals. (415 F. 2d 817 (1969)). (The author of this Brief would agree that municipalities have a positive obligation to provide public schools. However, there is no parallel obligation with respect to providing housing, as differentiated from zoning for low and moderate income housing).

POINT VI

THE COURT SHOULD DO NOTHING MORE THAN RULE ON THE VALIDITY OF THE ZONING ORDINANCES OF THE DEFENDANT MUNICIPALITIES

The plaintiffs are seeking remedies that go well beyond those imposed in Mount Laurel and Washington Township.

To this author it is evident that the proposed remedies are improper. However, even if a court were inclined to give such relief, this is not the proper case. The plaintiffs failed to produce credible evidence to support such drastic relief.

In the case of Harvard Enterprises v. Bd. of Adj. of Tp. of Madison, 56 N.J. 362 (1970), the validity of proximity regulations for gas stations was before the court. The majority opinion held:

> "To sustain its position, plaintiff had to demonstrate that the problems traditionally associated with gas stations--fire, traffic, aesthetic considerations--are no greater than for other commercial uses permitted in the same area. The record before us, however, may be characterized as an abstraction. Little information has been provided regarding the local situation. We do not know anything of the traffic pattern, or whether the road is used for local or through traffic. The Township suggests that through travelers tend to maneuver for a relatively quick stop when they chance to come upon a gas station, and hence an interval between stations is rational on that account alone. Without such local information, we cannot say that the ordinance in question is unconstitutional as applied to this property. Nor can we on this record say that every proximity regulation is inherently invalid." p. 369.

In the concurring opinion, Justice Hall stated:

> "I am convinced that it is time for judicial reconsideration of filling station zoning restrictions, including especially those dealing with a required distance between stations. They stem, as do decisions in this state generally upholding them, largely through repetition, from the early days of the motor vehicle and gasoline retailing." p. 370, 371.
>
> "But reconsideration should not be undertaken by a court in the absence of a full record of competent, relevant evidence, from appropriate zoning and other material standpoints, thoroughly exploring the matter. Such a record being so patently absent in this case, we should not get into the question at all." p. 371.

The New Jersey Supreme Court in Sente v. Mayor and Municipal Council, Clifton, 66 N.J. 204(1974) reviewed an ordinance which required a certain amount of minimum floor area for each occupant of a dwelling. In refusing to act on the matter, the court said, "A municipal enactment should neither be struck down nor validated when, as here, truly vital aspects have not been presented or considered."

The New Jersey Supreme Court has refused to change the existing law without a proper record. This Court should follow that example.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Court should only pass upon the validity of the Zoning Ordinances of the defendant municipalities. The other requests for relief should be dismissed. There is no legal basis for them, and the plaintiffs have not presented an adequate factual basis.

Furthermore, the County Planner testified that the 20 municipalities participating in the Urban County's program will require only 5,500 new, low and moderate income housing units by the year 1978. The proposed modifications to the Zoning Ordinances of these 20 defendants will allow for the construction of far more than 5,500 moderately priced dwelling units.

Respectfully submitted, on behalf of the defendants, Piscataway Township and Borough of South Plainfield

Daniel S. Bernstein

DANIEL S. BERNSTEIN
For the Firm

TABLE B3

1963 JOURNEY TO WORK

(Hundreds)

County of Residence	Bronx	Kings	New York	Queens	Richmond	Dutchess	Nassau	Orange	Putnam	Rockland	Suffolk	Westchester	Bergen	Essex	Hudson	Middlesex	Monmouth	Morris	Passaic	Somerset	Union	Central Naugatuck	Greater Bridgeport	Housatonic Valley	South Central	South Western	Valley	Total
Bronx	1720	156	2833	249	1	1	30	1	1	10	7	187	27	20	24	0	0	0	16	0	6	0	1	0	1	10	0	5301
Kings	113	4808	3843	660	10	1	124	1	0	0	26	17	42	36	69	3	0	3	8	0	11	0	2	0	0	3	0	9780
New York	328	322	6558	312	8	1	53	1	0	10	7	54	52	32	50	9	1	2	10	4	14	0	1	0	3	9	0	7841
Queens	165	751	3776	2806	6	1	395	0	0	1	51	46	27	15	27	47	2	1	10	0	4	0	1	0	0	6	0	7738
Richmond	1	44	304	.5	425	0	0	0	0	0	1	2	2	4	25	11	2	1	1	0	18	0	0	0	0	0	0	846
Dutchess	2	0	4	0	0	667	0	2	4	0	0	6	0	0	0	0	0	0	0	0	0	0	1	0	0	1	0	687
Nassau	45	295	1032	568	2	0	2481	0	0	1	228	19	7	5	7	2	1	1	3	0	0	0	1	0	0	4	0	4702
Orange	3	1	6	1	0	4	0	574	2	8	0	4	4	3	2	0	0	0	0	0	0	0	0	0	0	0	0	612
Putnam	6	2	6	0	0	11	0	2	85	0	0	33	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	145
Rockland	19	7	93	2	0	0	0	4	0	349	0	29	32	2	1	0	0	1	1	0	0	0	0	0	0	0	0	540
Suffolk	16	64	261	165	0	0	524	0	0	1	1505	3	0	3	1	0	0	0	1	0	0	0	0	0	0	0	0	2544
Westchester	183	25	772	37	1	5	9	2	6	15	3	1973	11	0	6	0	0	1	0	0	1	0	5	0	2	53	0	3110
Bergen	38	27	625	30	1	0	3	2	0	39	3	24	1614	142	225	11	0	17	297	3	30	0	0	0	0	3	0	3134
Essex	1	1	191	11	7	0	2	0	0	2	0	4	91	2495	178	46	7	85	103	7	276	0	0	0	0	0	0	3507
Hudson	9	16	368	19	9	0	2	0	0	1	1	1	137	151	1478	13	0	10	26	2	42	0	0	0	0	0	0	2285
Middlesex	0	6	87	3	6	0	1	0	0	1	0	1	12	117	48	1112	26	13	5	77	199	0	0	0	0	0	0	1714
Monmouth	1	1	85	3	1	0	0	0	0	0	0	0	10	71	38	70	938	1	4	6	42	0	0	0	0	0	0	1271
Morris	0	4	75	6	0	0	0	0	0	0	0	0	25	147	26	3	0	713	49	9	57	0	0	0	0	1	0	1115
Passaic	2	4	71	4	0	0	4	0	0	8	1	0	293	121	38	7	1	38	1011	1	4	0	0	0	0	0	0	1608
Somerset	0	1	25	1	0	0	0	0	0	0	0	1	1	27	5	96	1	23	0	289	62	0	0	0	0	0	0	532
Union	0	1	128	5	11	0	0	0	0	1	0	1	17	351	67	96	12	28	11	44	1117	0	0	0	0	0	0	1890
Central Naugatuck	0	0	0	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0	649	8	6	35	0	6	706
Greater Bridgeport	2	0	9	1	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	940	0	56	69	7	1085
Housatonic Valley	3	0	3	0	0	3	0	0	0	0	0	8	0	0	0	0	0	0	0	0	0	4	15	285	4	27	0	352
South Central	0	0	6	1	0	0	0	0	0	0	0	1	0	0	0	1	0	0	0	0	0	0	79	0	1456	15	19	1578
South Western	1	6	177	4	0	2	1	0	0	0	1	41	1	0	0	0	0	0	2	0	0	0	32	0	3	913	0	1184
Valley	0	0	0	0	0	0	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0	0	54	0	32	2	160	249
Region	2658	6542	20938	4893	488	696	3629	589	98	447	1834	2459	2405	3742	2315	1527	991	938	1558	442	1883	653	1140	291	1592	1116	192	66056

Source: 1963-4 Home Interview Survey and synthesis for areas outside the Cordon. Includes all vehicular modes, walk, work at home and "did not work on travel date."