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Plaintiffs' Brief in Support of Motion for Additional Relief as to the Conditionally Dismissed Municipalities

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

URBAN LEAGUE OF GREATER NEW BRUNSWICK, et al.,

Plaintiffs,

v.

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

Defendants.

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR ADDITIONAL RELIEF AS TO THE CONDITIONALLY DISMISSED DEFENDANT MUNICIPALITIES

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Plaintiffs submit this brief in support of their Motion for Additional Relief As to the Conditionally Dismissed Defendant-Municipalities.

During the trial of this case, this Court granted dismissals to 11 of the 23 defendant-municipalities conditioned solely on their adoption of appropriate amendments to their zoning ordinances. This Court has signed orders granting dismissal to 10 of those 11 defendants.*/

This Court's opinion of May 4, 1976, did not include these conditionally dismissed towns in the fair share plan, nor did the Court apply to these towns, as it did to the 11 others, its holding that they "must do more than rezone not to exclude the possibility of low and moderate-income housing in the allocated amounts", 142 N.J. Super. at 38. Throughout the trial, the plaintiffs stated their desire to include these towns in any order for affirmative relief that the Court might determine appropriate, and expressly reserved that right.

On May 12, 1976, plaintiffs moved, under the provisions of R. 1:7-4, for an order modifying the May 4, 1976 memorandum opinion. The motion requested, inter alia, that this Court record as a finding "that plaintiffs consented to the dismissals of the 11 substantially built-up municipalities on condition that these municipalities be retained for purposes of any affirmative relief the court might order." This Court denied that motion at a hearing on May 28, 1976.

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*/ Carteret is the one municipality which has not been granted an order of dismissal as of the date of this brief.

On August 31, 1976 plaintiffs noticed an appeal against these conditionally dismissed defendants. We based that appeal on the failure to include these 11 defendants in the fair share allocation plan and to require them to "do more" than revise their zoning ordinances. These 11 defendants moved to dismiss the appeals.

The Appellate Division granted the motions of 10 of these 11 defendants without prejudice to the plaintiffs to renew their motion for supplemental relief in the trial court.*/ In the orders of dismissal, the Appellate Division stated:

> This dismissal is without prejudice to the right of plaintiffs to apply to the trial court for such additional relief as may be appropriate to carry out the terms, both in letter and in spirit, of the settlement reached by the parties hereto.

The plaintiffs now seek such additional relief as to the conditionally dismissed municipalities.

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*/ The dates of the dismissals of appeal are as follows: Helmetta (11/24/76), Highland Park (11/24/76), Middlesex (11/24/76), Milltown (11/24/76), Woodbridge (11/24/76), South Amboy (1/26/77), Metuchen (1/26/77), Jamesburg (8/4/77), Spotswood (8/4/77), and South River (8/4/77). Carteret remains as a party before the Appellate Division because its motion to dismiss was denied (2/22/77).

It should be noted that on December 23, 1976 plaintiffs filed a Petition for Certification with the Supreme Court on the issue whether the Appellate Division properly dismissed the appeals against conditionally dismissed defendants while allowing the appeals to proceed against other defendants. On April 4, 1977, the Supreme Court denied plaintiffs' petition for certification.

ARGUMENT

POINT I. A FAIR SHARE ALLOCATION OF NEW, REHABILITATED AND SUBSIDIZED UNITS FOR EACH OF THE CONDITIONALLY DISMISSED MUNICIPALITIES IS BOTH NECESSARY AND APPROPRIATE.

As plaintiffs have frequently pointed out, this case is unlike earlier exclusionary land use cases decided by the Supreme Court in that it was brought against all the towns in a region, except for the older central cities of New Brunswick and Perth Amboy. These defendant towns all maintain exclusionary zoning laws and other land use policies and practices. These laws, policies, and practices, taken together, effectively bar plaintiffs and the class they represent from securing housing and employment opportunities outside the central cities of Perth Amboy and New Brunswick. This is true of both the 11 conditionally dismissed towns and the 11 towns subject to a fair share allocation.

There can be no doubt that exempting the conditionally dismissed defendants from a fair share allocation and affirmative relief undermines the effectiveness of the remedy that can be afforded to plaintiffs and the class they represent. Although this Court considered these municipalities to be "substantially built up," 142 N.J. Super. at 24, they can nonetheless accommodate a significant number of new housing units. The aggregate vacant acreage in these 11 conditionally dismissed towns is substantial. The record discloses that these 11 municipalities contain over 1600 acres of vacant land zoned for residential

use (Exhibit P-105). Furthermore, vacant acreage in industrial and related zones exceeds 1800 acres. Thus, in the aggregate there are at least 3400 vacant acres in these 11 municipalities.

Even the vacant land in individual towns is significant. As this Court noted in its opinion, Woodbridge, which the Court included among the substantially built up municipalities has about 800 vacant acres suitable for housing, Spotswood has 200 such acres, and Jamesburg, South Amboy, and South River each has about 100 such acres. 142 N.J. Super. at 24. It should be noted that Woodbridge, with 800 vacant acres suitable for housing exceeds the net vacant acreage suitable for housing in South Plainfield, one of the towns subject to a fair share allocation. 142 N.J. Super. at 28.

Thus, vacant acreage is far from negligible in the 11 conditionally dismissed towns. Many of these individual towns have substantial vacant acreage to accommodate new housing. And in the aggregate, the 11 conditionally dismissed municipalities possess several thousand acres of land that can accommodate new housing.

Further, a town's capacity to accommodate new housing cannot be evaluated solely in terms of current vacant acreage. A community's housing stock is dynamic not static. There is constant need for replacement of dilapidated structures. None of these communities is free from such dilapidated structures, either currently in need of replacement or soon to be in need of replacement. In addition, rehabilitation of deteriorating

housing units is both needed and advantageous.*/

Individually, each of the conditionally dismissed municipalities, through the combination of available vacant land, replacement of existing structures, and rehabilitation of deteriorating housing, can contribute significantly to increasing the supply of housing for low and moderate income persons.**/ In the aggregate, the contribution of these conditionally dismissed municipalities can be enormous.

Thus, plaintiffs submit that this Court should order a fair share allocation for these towns which would include new, rehabilitated and subsidized units. Not to do so undermines the effective remedy required for the plaintiffs and the class they represent. There must be some assurance that housing for lower income persons will be provided in the future in these towns. The fair share allocation is one step to that end. This Court's admonition to the 11 municipalities charged with fair share allocations that they "must do more than rezone not to exclude the possibility of low and moderate income housing in

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*/ Each of these communities receives federal funds under the Community Development Block Grant Program pursuant to the Housing and Community Development Act of 1974, 42 U.S.C. 5301 et seq. These funds can be used for rehabilitation benefiting low and moderate income persons.

**/ The circumstances in this case are clearly distinguishable from the situation presented in Segal Construction Co. v. Zoning Bd. of Adj. Wenonah, 134 N.J. Super. 421 (App. Div.), certif. den. 68 N.J. 496 (1975). Wenonah was a single town of one square mile which was not exclusionary. The Court in the Wenonah case appeared to be saying that the impact of a decision as to Wenonah was de minimis. The Court discussed the "minor contribution of Wenonah to the housing needs, if there be any, of Gloucester County." 134 N.J. Super. at 424.

the allocated amounts," applies to the 11 "conditionally dismissed" municipalities.*/

The "conditionally dismissed" defendants, may contend that they are exempt from Mt. Laurel, in light of Pascack Assoc. v. Mayor & Council of the Tp. of Washington, ___ N.J. ____ (1977) and Fobe Associates v. Mayor and Council & the Board of Admustment of the Borough of Demarest, ___ N.J. ___ (1977). This is simply not the case, as an examination of these two recent opinions demonstrates. The first distinguishing characteristic is that the present case involves 22 defendant municipalities, representing nearly the entire county, not an isolated town, as in Washington Township and Demarest. The injury to plaintiffs here is the result of the cumulative impact of defendants' acts, not the act of a single town of miniscule size.

Second, in both Washington Township and Demarest each of the defendant municipalities was a homogeneous community of single-family homes. Plaintiffs in those suits sought only to construct one type of housing, multi-family housing, a type almost non-existent in the municipality, and sought to build that type of housing on a particular tract. In the suit at hand, plaintiffs seek a broad variety and choice of housing to be provided within defendant communities. The conditionally dismissed communities are not homogeneous towns as are Washington Township and Demarest; historical development is quite different in the case at hand.

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*/ The authority to order relief as to the "conditionally dismissed" municipalities is set forth in the next section of this brief.

Third, the court in Demarest emphasized:

> There is no industry and little commerce in Demarest. Thus, local activities of the latter kinds have generated no correlative need for housing, cf. Mount Laurel, 67 N.J. at 187 . . . .

By contrast, in the instant case, the conditionally dismissed municipalities have substantial industry and commerce. Here, local activities have indeed "generated [a] correlative need for housing."

Finally, it is important to note that the housing sought to be built in Washington Township and Demarest was not "least-cost" housing, affordable by low and moderate income persons. In these cases, the plaintiffs sought to build multi-family dwellings for upper income persons. Again, the contrast with this case is clear. This suit seeks to increase the supply of standard housing for low and moderate income persons. */

A sharp distinction, for relief purposes, between the conditionally dismissed municipalities and those charged with fair share allocations is not supported by the facts. All of the defendant municipalities maintain unconstitutionally exclusionary zoning laws. All can contribute significantly to increasing the supply of low and moderate income housing in the County. All should be subject to fair share alloca-

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*/ The same distinctions drawn between the case at hand and Demarest can be drawn between the instant case and Nigito v. Borough of Closter, 142 N.J. Super. 1 (App. Div. 1976). In addition, in Closter the trial court found, and the appellate division affirmed the finding, that whatever housing need there was, it was being met by housing afforded in neighboring communities. This is not the situation in the instant case, where the exclusion of lower income housing is virtually County-wide.

tions for "least-cost housing." And all should be subject to the mandate to "do more than rezone not to exclude the possibility of low and moderate income housing."

POINT II: EACH CONDITIONALLY DISMISSED DEFENDANT SHOULD DEVELOP AN IMPLEMENTATION PLAN FOR AFFIRMATIVE RELIEF.

Plaintiffs underscore this Court's directive to the 11 fair-share defendants that they "must do more than rezone not to exclude the possibility of low and moderate income housing." 142 N.J. Super. at 38. In so stating, this Court recognized the plain fact that mere elimination of negative zoning provisions by these defendant municipalities provides no reasonable assurance that low and moderate income housing will be provided within their borders. This Court also recognized that the remedy for exclusion of low and moderate income housing--which is the constitutional wrong done to the plaintiffs--is inclusion of such housing. This Court impliedly acknowledged--and plaintiffs agree--that to the extent the defendants can satisfy that remedial obligation through changes in their zoning laws, no more would be required of them.*/ At the same time, this Court cautioned that steps over and above mere rezoning might be necessary and spelled out some of the steps defendants might have to take. The same rationale must, perforce, apply to the conditionally dismissed defendants.

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*/ Indeed, plaintiffs suggested several such changes, including "special exceptions" for developers of low and moderate income housing, "density bonuses", and provision for mobile homes, that would act as a "positive spur" to the provision of such housing. Post-trial Brief of Plaintiffs, at 29.

(1) Defendants' initial obligation. Plaintiffs agree, as this Court suggested, that it is the obligation of the municipal defendants to develop the necessary plans to provide the remedy of adequate low and moderate income housing. It is not the role of the Court initially to define the precise contours of the defendants' remedial measures. As the Supreme Court has stressed: "We think it clear that the judiciary should not itself devise a plan except as a last resort." Jackman v. Bodine, 42 N.J. 453, 473 (1964). The courts should defer "to the local [municipalities] the choice in the first instance among the various solutions . . . " Booker v. Board of Education, Plainfield, 45 N.J. 161, 178 (1965). See also Robinson v. Cahill, 62 N.J. 473 (1973); Reynolds v. Sims, 377 U.S. 533 (1964).

(2) Additional steps needed. In its May 4, 1976 decision this Court, after admonishing the defendants that mere rezoning to eliminate negative zoning features would not satisfy their obligation to remedy their constitutional violations, identified a number of programs and activities which, if adopted by the defendant municipalities, would constitute an appropriate and adequate implementation plan.

> Approvals of multi-family projects, including Planned Unit Developments, should impose mandatory minimums of low and moderate-income units. Density incentives may be set. Mobile homes offer a realistic alternative within the reach of moderate and even low-income households. The eleven municipalities should pursue and cooperate in available federal and state subsidy programs for new housing and rehabilitation of substandard housing . . . . 142 N.J. Super. at 38-39.

Some of these involve zoning changes that would affirmatively encourage provision of low and moderate income housing. Others involve affirmative steps that go beyond alterations in zoning laws.

Furthermore, the Supreme Court in Oakwood enumerated a number of measures which municipalities might consider in meeting their obligations to provide opportunities for the construction of "least cost" housing. Among the many alternatives, it mentioned participation in public-housing programs*/ and provisions for density bonuses. In addition it noted the suggestions contained in the supplemental amicus brief of The Public Advocate and Justice Pashman's concurring opinion in Mt. Laurel, 67 N.J. at 209-213.

At the trial of this case, expert testimony, especially by Alan Mallach, plaintiffs' expert witness, and Douglas Powell, Executive Director of the Middlesex County Planning Board, provided extensive analysis of the options available to the defendants in devising an adequate implementation plan. Finally, the New Jersey Department of Community Affairs recently issued a publication describing the various programs and mecha-

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*/ The Court declined to require such participation at that time in the case before it. In the present case, the defendants might well decide collectively to participate in such programs as one way of satisfying their obligation to provide opportunities for lower income persons to reside in their communities.

nisms available to local communities for the development of "least-cost" housing.*/

In summary the courts have recognized, and experts have offered, a variety of measures, through zoning changes and otherwise, which would facilitate the provision of "least-cost" housing for low and moderate income persons. The only element missing in this case is an order that these defendants adopt such measures as are necessary to assure an adequate remedy. In our view, this Court should order the conditionally dismissed municipalities to examine all the available alternatives and to design, either individually or collectively, an implementation plan. Only in this manner can the constitutional rights enunciated in Mt. Laurel and reaffirmed in Oakwood be effectively vindicated.

(3) Limitations on judicial authority. The plaintiffs stress that we are not asking this Court to order the defendants to adopt any particular program or approve any specific inclusionary device. We seek merely an order to require the defendants, under general guidelines, to design a plan which will "make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who may desire to live there, of course including those of low and moderate income." Mt. Laurel, supra at 187. The revision of their zoning ordinances while undoubtedly providing some

*/ That publication is entitled: Housing Handbook for New Jersey Municipalities (December 1976). See also Franklin, Falk, and Levin, In-Zoning: A Guide for Policy-Makers on Inclusionary Land Use Programs (The Potomac Institute, Wash., D.C., December, 1974).

opportunity for the construction of "least-cost" housing, will not provide an adequate remedy.

To maximize those opportunities, as this Court stressed, the defendants "must do more than rezone not to exclude the possibility of low and moderate-income housing in the allocated amounts." 142 N.J. Super. at 38. Requiring them to develop an implementation plan is, in our judgment, a necessary additional step in cases such as this one where contiguous communities have used zoning to exclude lower income people from large geographical areas comprising nearly all of Middlesex County. If the defendants submit an implementation plan to the trial court which, after a hearing, is determined to be inadequate, it will be time enough to consider whether the Court should order specific additional measures to assure the provision of "least-cost" housing. Until the day when the defendants refuse to adopt an adequate plan--and plaintiffs do not believe that these municipal defendants will refuse to obey a Court order--it is "at least premature" for the court to decree one. Mt. Laurel, supra at 192. For now it is sufficient to require the defendants to devise such a plan on their own with the aid of state, county and federal planning and housing officials.

CONCLUSION

Based on the above reasons, plaintiffs respectfully request that this Court grant plaintiffs motion for additional relief as to the conditionally dismissed defendants.

Respectfully submitted,

Marilyn Morheuser

MARILYN MORHEUSER

Dated: September 27, 1977

CERTIFICATE OF SERVICE

I hereby certify that service of this Plaintiffs' Brief in Support of Motion for Additional Relief As to the Conditionally Dismissed Defendant Municipalities was made by mailing the original and one copy to the Clerk, Superior Court of New Jersey, one copy to the Middlesex County Clerk, one copy to the Honorable David D. Furman, and one copy to each of the attorneys for the defendants.

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