CA - East Brunswick

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Brief for Defendant - Appellant, Township Council of the Township of East Brunswick

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CA 001307B

Superior Court of New Jersey

APPELLATE DIVISION

DOCKET NO. A-4681-75

URBAN LEAGUE OF GREATER NEW BRUNSWICK, ET ALS.,

Plaintiff-Respondent

vs.

THE MAYOR AND COUNCIL OF THE BOROUGH OF CARTERET, ET ALS.,

Defendant-Appellant.

Civil Action

On Appeal From Judgment of the Superior Court of New Jersey, Law Division, Middlesex County

Sat Below:
Hon. David D. Furman, J.S.C.

BRIEF FOR DEFENDANT–APPELLANT, TOWNSHIP COUNCIL OF THE TOWNSHIP OF EAST BRUNSWICK

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STATEMENT OF ISSUES

1. Was there authority for the trial court to make a numerical allocation in the first instance without first affording each municipality the opportunity to submit its own fair share proposal?

2. Was there any rational basis for the trial court's determination that the housing need for Middlesex County was 18,697 units by the year 1985 after taking into account housing units to be provided by 11 conditionally dismissed defendants?

3. Was there any rational basis for the trial court's determination that the percentage of low and moderate income persons in the County as of 1970 would be the basis for allocating housing units through 1985.

4. Was there a rational basis for the trial court, after making an initial allocation to "correct a housing imbalance, to apportion the net balance equally among 11 municipalities without regard to availability of land, job opportunities, cost of land, percentage of land zoned for business or industry or any other factor."

5. Did the trial court exceed its powers and usurp legislative and administrative powers by attempting to allocate housing units and retain jurisdiction.

6. Did the trial court have authority to order affirmative relief.

7. Did the trial court commit reversable error by permitting dismissals as to Perth Amboy and New Brunswick when the plaintiffs' own allocations for those municipalities were substantial.

8. Were plaintiffs, Kenneth Tuskey and Judith Champion representatives of a class worthy of protection.

9. Did the plaintiffs or any of them have standing to attack the zoning ordinances of the Township of East Brunswik when none of them ever sought housing in East Brunswick.

10. Were the defendants substantially prejudiced by receiving late notice of plaintiffs' experts, inadequate notice as to their reports and insufficient time to take their depositions.

PROCEDURAL HISTORY

This is an appeal from a judgment granted by the Superior Court of New Jersey, Chancery Division, Middlesex County, ordering eleven municipalities to enact zoning ordinances to accommodate their respective fair share allocations of low and moderate income housing as specifically outlined in the Court's written opinion dated May 4, 1976. Under the Trial Court's ruling, the Township of East Brunswick was obligated to amend its zoning ordinance to permit the construction of 2,649 units of low and moderate income housing by the year 1985. Alternatively, East Brunswick was ordered to rezone all of its remaining vacant land suitable for housing in order to permit or allow low and moderate income housing on a ratio of 15% low and 19% moderate income housing units in accordance with percentages of low and moderate income housing units in Middlesex County as of 1970. All of the defendants were required to amend their zoning ordinances within 90 days of the entry of judgment which was dated July 9, 1976.

The Trial Court retained jurisdiction over the litigation for the purpose of supervising the full compliance with the terms and conditions of the judgment. Applications for special relief from the terms and conditions of the judgment were specifically reserved by the court in Paragraph 18 thereof.

The Trial Court made a specific finding that the plaintiffs were entitled to represent a class of low and moderate income people and had standing to institute suit.

The Trial Court dismissed allegations that the defendants had violated the Federal Civil Rights Act and also dismissed plaintiffs' application for counsel fees. While the judgment reserved the right to the plaintiffs to apply for costs by separate motions, these motions ultimately were denied.

The eleven municipalities charged with fair share allocations were required to impose mandatory minimums of low and moderate income units in applications for multi-family housing. The court further stated that the eleven municipalities should pursue available Federal and State subsidy programs for new housing and rehabilitatin of substandard housing.

The Trial Court dismissed the Third Party Complaints against New Brunswick and Perth Amboy.

Notices of Appeal were filed by Cranbury, East Brunswick, Monroe, Piscataway, Plainsboro, Sayreville, South Brunswick, and South Plainfield. An application for a stay of the judgment was made to the Trial Court on September 24, 1976, which application was denied. Application for a temporary stay was then made to Judge Baruch S. Seidman of the Appellate Division of the Superior Court of New Jersey which application was granted on September 30, 1976. Ultimately, the full three judge panel of the Superior Court of New Jersey granted the stay.

Plaintiffs filed cross appeals to the Trial Court's judgment.

STATEMENT OF FACTS

At the time of the trial of this case in February and March of 1976 the Township of East Brunswick was in the process of reviewing and amending its Master Plan in order to comply with the decision in Southern Burlington County NAACP v. The Township of Mount Laurel, 67 N.J. 151 (1975). In view of the fact that the Master Plan was not yet adopted, the Township put forth a factual and environmental defense to the allegations contained in the complaint. (DEBal-68).

While none of the plaintiffs had ever attempted to locate housing in East Brunswick, with the possible exception of one half-hearted effort by Judity Champion, the court nevertheless found East Brunswick's ordinance invalid and ordered the Township to zone for the construction of 2,649 units of low and moderate income housing by the year 1985.

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POINT I

THE TRIAL COURT FAILED TO PERMIT EAST BRUNSWICK TO PRESENT ITS OWN FAIR SHARE PLAN.

A. East Brunswick presented special factors which justified its zoning ordinance.

The limitations on the density of housing permitted under the East Brunswick zoning ordinance were justified by ecological and environmental factors. Evidence presented before Judge Furman indicated the substantial danger of pollution of a regional water supply together with exceedingly poor drainage.

The Court in Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel, 67 N.J. 151 (1975) recognized the relationship between land use regulations and the preservation of the environment. The Court said at page 186:

> "This is not to say that land use regulations should not take due account of ecological or environmental factors or problems. Quite the contrary. Their importance, at last being recognized, should always be considered. Generally only a relatively small portion of a developing municipality will be involved, for, to have a valid effect, the danger and impact must be substantial and very real (the construction of every building or the improvement of every plot has some environmental impact) - not simply

> a makeweight to support exclusionary housing measures or preclude growth- and the regulation adopted must be only that reasonably necessary for public protection of a vital interest."

The Court also recognized that additional low and moderate income housing would not be required in the residential "mix" if opportunity for such housing has already been realistically provided for elsewhere in the municipality. (page 187)

The Mt. Laurel Court approved the action taken by the Trial Judge requesting the Township to compile information and estimates concerning the housing needs of persons of low and moderate income residing in the Township in substandard dwellings and those presently employed or reasonably expected to be employed therein (page 190).

The Court further suggested that developing municipalities might provide sections for every kind of housing from low cost and multi-family to lots of more than an acre with very expensive homes (pages 190-191).

The Mt. Laurel Court did not "intend that developing municipalities shall be overwhelmed by voracious land speculators and developers." (page 191)

With regard to remedy, the Court said the following:

> "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 [amendments to correct deficiencies] within the guidelines we have laid down." (page 191)

While leaving decision making to the local municipality, the Court admitted that there was no legal obligation to

establish a local housing agency but only a moral obligation (pg. 192). After stating that the Trial Judge asked pertinent questions concerning housing needs, the Supreme Court held that this portion of his opinion was vacated as being premature. While Judge Furman acknowledged in his opinion that East Brunswick was beset by a number of environmental problems, he did not seem to take them into account when he evaluated the trial testimony, the fair share plans submitted with the trial briefs, or the Master Plan submitted with a motion for relief from the judgment. East Brunswick adopted a Master Plan which incorporated a Natural Resources Inventory after having made a careful study of its own limitations. Neither the plaintiffs, the County nor the State were as close to the problems as was East Brunswick.

Many mitigating factors were conceded by plaintiffs' witnesses: Before locating low and moderate income housing, Alan Mallach would consider the following: (2/19/76, T127-7 to 135-24)

1. Existing character of community
2. Middlesex County Master Plan
3. Preservation of Agricultural land
4. Soil types
5. Existing housing
6. Transportation facilities
7. Regional water supply

Barry Sullivan of the Division of State and Regional Planning in the New Jersey Department of Community Affairs noted that low and moderate income housing should not be located on slopes in excess of twelve (12%) per cent or on flood plains. (2/23/76, T32-24 to 35-14)

Even Ernest Erber conceded that environmental factors were relevant. (2/17/76, T 65-13 to 24). Douglas Powell, Director of the Middlesex County Planning Board, testifying for East Brunswick (3/15/76, T77-1 to 81-3) indicated that major acquifers, valuable wetlands and highly productive soils were located throughout much of East Brunswick.

Only Dr. Lawrence Mann, plaintiffs' most esoteric and least credible witness, would allow for no special factors to justify the absence of more low and moderate income housing, except, perhaps, for unique soil on which cranberries or avocadoes could be grown. (2/5/76, T509-15 to 510-18) It was Dr. Mann who disagreed with the Farmland Assessment Act, the State Constitution, and the methods by which municipalities were interpreting the zoning statutes. (2/5/76, T608-17 to 613-5)

Mr. Mallach, relying upon figures prepared for the New Jersey Department of Community Affairs in 1970 based upon information which came in between 1967 and 1970, claimed that East Brunswick had in excess of 7,150 developable acres. (P-111)

In rebuttal, Gerald Lenaz of Raymond, Parrish & Pine, Inc. stated that there was a gross figure of 5,145 acres after subtracting public and other tax exempt lands, noncontiguous parcels under one acre and noncontiguous parcels incapable of other than odd-lot development due to shape. (3/15/76, T 7-17 to 22) From that figure were subtracted those lands which are subject to severe environmental constraints, as identified by the Natural Resource Inventory (DEB-7),[1] a document consisting of 247 pages and many large maps. By applying a series of factors to the remaining acreage taking into account designated flood plain area, soils classified as stream overflow hazard areas, poorly drained soils exhibiting seasonally high water tables at the surface, and a series of other factors referred to in the

1. DEBa243

Natural Resource Inventory, Mr. Lenaz indicated that there would be 2,251 developable acres. (3/15/76, T12-4) He then allocated fifteen (15%) per cent of that figure for public improvements and came up with a bottomline figure of 1,913 acres suitable for development. (3/15/76, T12-19)

East Brunswick has three and a half (3 1/2%) per cent of the developable land in the County (3/15/76, T16-13) but Judge Furman has allocated 2,649 low and moderate income housing units for East Brunswick out of an alleged need of 18,697 such units for the eleven (11) municipalities whose ordinances were found invalid. This results in a mandated percentage for East Brunswick of 14.17%. While it is possible that the total County need found by Judge Furman exceeded 18,697, nowhere can that total figure be found in his opinion.

In support of the testimony of Mr. Lenaz was that of Margaret Bennett, the author of the Natural Resource Inventory. (DEB-7). In addition to the factors referred to by Mr. Lenaz she mentioned aquifer recharge areas, agricultural soil suitability, soil frost action potential, soil shrink-swell potential, subsoil shear strength, soil depth to bedrock and existing vegetation. (3/15/76, T116-19 to 117-17) She stated that the aquifer recharge areas near Farrington Lake recharged the Farrington Sands and that the recharge areas near Jamesburg Park provide intake for the Old Bridge Sands. (DEB-7). Each of these aquifers provides a source of water for East Brunswick and the surrounding region.(3/15/76, T80-14 to 19)

Ms. Bennett further indicated that excessive development results in salt water intrusion into the drinking supply. (3/15/76, T122-11). She stated that in Sayreville, the Farrington Sands are so contaminated that they cannot be used for a fresh water supply. (3/15/76, T122-21) .

She further identified as environmentally sensitive areas the tidal marshes which lie along the South River in the southeastern portion of the Township and along the Raritan River in the northeastern portion of the Township. (3/15/76 T123-7 to 124-7) . She then generally identified the flood areas in East Brunswick and stated that where there were steep slopes, development should be of very low density.

Ms. Bennett further testified that the Pine Barrens located in the vicinity of Jamesburg Park, Ryders Lane and Tices Lane reach their northern most extent in this area. (3/15/76, T124-17) . She urged that this unique vegetation type of the Atlantic Coastal Plain should be preserved. (3/15/76, T 124-14).

With regard to the aquifer intake areas, she testified that the volume of surface water run-off should be minimized and should be kept free of nutrient or toxic chemical pollutants. (3/15/76, T129-9) .

As to the 500 acres in the Riva Avenue section west of the Turnpike, she noted that this entire area was served by septic tanks. (3/15/76, T118-12). As stated on page 160 of the Natural Resources Inentory, which is in evidence as Exhibit DEB7,

she writes:

> "This quantity of waste poses a real threat to the quality of ground water in the vicinity since the area serves as an aquifer intake area for the Farrington Sands."

Ms. Bennett noted that there is little land remaining in the Township, as shown on Map #8, which is both naturally "most suitable" for development and not yet developed. She stated that none of the Township is safe for development involving landfill disposal of solid waste or involving septic systems due to the severe hazard of ground water and/or surface water pollution (See Natural Resources Inventory, page 202). Finally, Ms. Bennett noted that if the environmentally sensitive areas could sustain increased development it would be at an increased cost which would result in higher costs being passed on to the purchaser. (3/15/76, T127-3). This would defeat the very intent of low and moderate income housing.

Rose Sakel, a citizen who has been actively interested in preserving the environment over many years, testified that the County had not acquired all of the environmentally sensitive land for Jamesburg Park in the southern portion of the Township. While the County has acquired 1,138 acres, Ms. Sakel suggested an additional 435 acres should be acquired in order to prevent pollution of the aquifer intake area. (3/15/76 T107-2).

Similarly, Douglas Powell testified for the Township with reference to the December 1975 Middlesex County Planning Board

publication entitled "Critical Natural Features, Phase I" (DCR-2 in evidence). He stated that about twenty per cent of East Brunswick soil covered major aquifers and referred to the chart in the exhibit opposite page 22. (3/15/76, T78-20). He further identified the flood plains, wet lands and forests in East Brunswick which are worthy of preservation.

Louis H. Budd, Jr., East Brunswick Zoning Officer, testified with regard to the flood plain maps and indicated that there are many areas not shown on the maps which are subject to continual flooding. (3/16/76, T42-11 to 46-8). He identified Beaverdam Brook, Irelands Brook, Saw Mill Brook and other waterways which create flooding conditions.

Leonard S. Hilsen, East Brunswick Director of Health, Environment and Welfare, testified that the entire areawest of the New Jersey Turnpike was unsuitable for multi-family or high density housing. (3/16/76, T53-25 to 55-22). He referred to problems resulting from the saturation of septic fields. (3/16/76, T56-17 to 57-15).

By way of conclusion on this point, it is submitted that East Brunswick put forth an extremely strong environmental defense. It is submitted that P-104 and P-105, which purportedly show existing and future land use in the Township, should have been given little or no weight. Because they are prepared from other documents, rather than from an in-depth knowledge of the land and local conditions, they are not trustworthy. In turn, the plaintiffs relied upon State figures

for developable vacant land in order to come up with a distribution of some of the low and moderate income housing among the municipalities. Since the plaintiffs' figures are incorrect, their distribution scheme must also fail.

B. The Trial Court should have considered the Fair Share Plan submitted with the Trial Brief in accordance with the court's instruction.

As a complete reading of the transcript will indicate, the trial came to an abrupt and unexpected end on March 23, 1976. Judge Furman specifically stated that he did not adopt the Fair Share Allocation formula presented by the plaintiffs' expert, Ernest Erber (3/23/76, T 64) and further conceded that the only fair share formula in evidence was that presented by Mr. Erber. (Ibid., T 70). The court specifically invited the defendants to submit fair share formulas with their trial briefs at the close of trial.

Accordingly the Township of East Brunswick submitted its own proposal, referred to in the appendix as tables D-1, E-1 to E-3, F-1 to F-3 and G-1 (DEB136 to 143).

East Brunswick explained in its trial brief that Master Plan hearings were proceeding at the time that briefs were being exchanged. When the 1970 Master Plan had been adopted, it had been anticipated that a new Interchange on the New Jersey Turnpike would be located at the southern boundary of East Brunswick near Church Lane. Accordingly, much of that land had been zoned for industry. It had also been assumed that the

Driscoll Expressway would connect East Brunswick to Toms River. Because those proposals now seemed remote, the proposed Master Plan had suggested rezoning substantial industrial acreage to planned residential communities. (DEBa264-265).

The trial brief further noted that the Master Plan suggested rezoning in the center of town, lots of one-half acre (R-2) to multi-family dwellings having densities ranging from 5 to 12 dwelling units per acre.[1] It was indicated that density bonuses were proposed for a developer who would apportion fixed percentages of the units for low and moderate income housing, in which case he would be able to develop at the maximum density.[2] In addition, the Master Plan indicated three small zones for medium-high density housing at 28 to 36 dwelling units per acre.[3]

East Brunswick took the position in its trial brief that ordinances implementing the proposed Master Plan would meet East Brunswick's Fair Share of the low and moderate income housing need in the region. Accordingly the existing standards for lot size, frontage, minimum floor area and other restrictions in the single family zones should have been upheld as should be amenities for the multi-family zones. It was stressed that Mt. Laurel did not require that all minimums must be eliminated but only that the municipality provide a broad range of housing. People should still be permitted to purchase homes costing in excess of $100,000. As was argued below, it would be inconceivable that such housing would be built in municipalities such as Helmetta, Jamesburg or Carteret, while the same could be

1. DEBa278-282
2. DEB288-289
3. DEBa282-283

reasonably placed in Metuchen, Cranbury or East Brunswick.

East Brunswick objected to the imposition of any housing allocation plan. Nevertheless the tables referred to above were submitted on the assumption that East Brunswick started with a base of 3,395 acres of developable land, rather than the 1,913 acres to which Gerald Lenaz had testified to in court. It also assumed that Middlesex County had 101,328 acres of developable land. The position taken at the trial was that East Brunswick's share for 1980 would be 1,875 rather than 4,529 proposed by Ernest Erber in a plan specifically rejected by the court.

East Brunswick proposed a Fair Share Plan, however, based upon job generation rather than a relationship between low and moderate income families in the Township as compared to the County.[1] Under the East Brunswick approach, the following methodology was suggested:

(a) determine number of new jobs expected in the region

(b) define East Brunswick's share of the region's job growth by utilizing the following ratio applied against the total new job estimates:

$$\frac{\text{East Brunswick's developable zoned vacant job producing lands}}{\text{County Developable Zoned Vacant Job producing lands}}$$

Job producing lands include industrial and commercial land uses.

(c) determine what percentage of these jobs will be held by low/moderate income salaried employees

1. DEBa156 to 170

(d) determine number of new low/moderate income households as result of new job generation.

Tables F-1 through F-3 apply this basic approach on two assumptions; jobs based on existing zoning as well as the proposed Master Plan. Table F-1 estimates East Brunswick's share of regional employment based on existing zoning and proposed Master Plan. Table F-2 calculates East Brunswick's fair share as a result of its present zoning. Table F-3 calculates East Brunswick's fair share as a result of the revised Master Plan proposals. To these fair share estimates would be added the existing low/moderate income housing need. The existing need has been extracted from the Township's Housing Assistance Plan prepared as part of its participation in the Community Development Revenue Sharing Program. This method has been used as a guide in developing the revised Master Plan.

It is submitted that an allocation method which is based on relating new housing to new jobs is an equitable concept in achieving a balanced housing plan where workers could conceivably live in the town of their employment, if they so desire.

It was further suggested in the trial brief that the East Brunswick formula was similar to that employed in the Urban County Application and that East Brunswick would find this method worth pursuing in achieving a reasonable and workable regional housing plan.

In its reply trial brief East Brunswick submitted a

certification dated April 19, 1976 by Gerald Lenaz, its planner and witness. (DEBa144-170)

There is no evidence in the opinion of the trial court that any of these documents, which were solicited by the trial court, were in fact relied upon by it.

In Mt. Laurel, the Supreme Court clearly stated that "the municipality should first have full opportunity to itself act without judicial supervision. 67 N.J. 151 at page 192

Mt. Laurel further noted that it was the local function and responsibility, in the first instance at least, rather than the Court's, to decide on the details of the amendments necessary to correct deficiencies. Ibid.

In vacating the affirmative action required by the Trial Court of Mt. Laurel, the Supreme Court said: "Courts do not build housing nor do municipalities...The municipal function is initially to provide the opportunity through appropriate land use regulations and we have spelled out what Mt. Laurel must do in that regard...It is not appropriate at this time. particularly in view of the advanced view of zoning law as applied to housing laid down by this opinion, to deal with the matter of the further extent of judicial power in the field or to exercise any such power... 67 N.J. 151 at page 152.

POINT II

THE TRIAL COURT SHOULD BE REVERSED ON THE GROUNDS THAT IT FAILED TO APPROVE THE MASTER PLAN SUBMITTED BY THE TOWNSHIP OF EAST BRUNSWICK FOLLOWING JUDGMENT .

The court was well aware during the course of the trial that East Brunswick was undergoing a Master Plan review in order to achieve compliance with the Mt. Laurel decision. The court's opinion was delivered on May 4, 1976 and the East Brunswick Master Plan was adopted on May 19, 1976. Judge Furman specifically authorized municipalities to seek relief from the judgment if, in effect, they could show compliance.

On September 24, 1976 a motion was filed by East Brunswick to be relieved of the judgment on the grounds that the Master Plan had been adopted and the Township was in the process of preparing ordinances implementing the plan.[1] Judge Furman had ordered East Brunswick to enable the construction of 2,649 low and moderate income units by the year 1985. The Master Plan would have permitted approximately 1750 units by 1985 (Table F-3 East Brunswick Master Plan).[2]

During oral argument the court complimented East Brunswick for its efforts but stated that the Township had not gone far enough under his view of the law.[3] Accordingly the motion to be relieved of the effect of the judgment pending the implementation of the Master Plan was denied.[4]

In fact East Brunswick has continued to implement the

1. DEBa237
2. DEBa356
3. DEBa377
4. DEBa378

Master Plan notwithstanding the appeal. The East Brunswick Township Council adopted on first reading on April 25, 1977 Ord. No. 77-264-B providing for rezoning of substantial areas of the Township to permit least cost housing, townhouses, patio houses and multiple dwelling groups. A copy of the ordinance is annexed hereto.[1] It should be pointed out that the lands which have been rezoned are centrally located and served by all utilities. In effect, East Brunswick has adopted an ordinance pending litigation, not to frustrate the course of the litigatin but to implement the Mt. Laurel case which has been clarified and refined by Oakwood, Washington Township and Demarest. Oakwood appears to develop three areas of inquiry:

1. Is the zoning ordinance exclusionary?
2. Should the Trial Court demarcate the "region" and determine the "fair share" of regional need?
3. What is the proper judicial remedy?

(See "Oakwood at Madison: A tactical Retreat by the New Jersey Supreme Cort" by Jerome G. Rose, Professor and Chairman, Department of Urban Planning and Policy Development, Livingston College, New Jersey Municipalities, April 1977) Appendix.[2]

Professor Rose states that the test established by Oakwood is whether the zoning ordinance operates in fact to preclude the opportunity for the requisite share of low and moderate income housing to be built. It is submitted that the Master Plan considered by Judge Furman, the expert reports submitted by East Brunswick through Gerald Lenaz and the PURD ordinance

1. DEBa437 to 440. These ordinances were adopted on the second reading on May 9, 1977.
2. DEBa425

implementing the planning in fact encourage construction of low and moderate income housing and least cost housing. All of the efforts referred to above constitute a bona fide effort by East Brunswick toward the elimination or minimization of undue cost-generating requirements in the zoning ordinance.

The standard is set forth in Oakwood as follows:

> "To the extent that the builders of housing in a developing municipality like Madison cannot through publicly assisted means or appropriately legislated incentives...provide the municipality's fair share of the regional need for lower income housing, it is incumbent on the governing body to adjust its zoning regulations so as to render possible and feasible the "least cost" housing, consistent with minimum standards of health and safety, which private industry will undertake, and in amounts sufficient to satisfy the deficit in the hypothesized fair share." (Page 36 of majority opinion)

Oakwood appears to give its blessing to density bonuses (page 44 of opinion). East Brunswick provides such bonuses. Oakwood frowned upon rent skewing. (pages 44-45) East Brunswick avoids the practice. Madison Township provided for a protracted approval process adding greatly to the cost of projects (52). East Brunswick has no such requirements. Madison located the planned unit development zones in remote areas (page 50). East Brunswick has provided for central location.

In answer to the first question East Brunswick clearly has provided a Master Plan and implementing ordinance which is not exclusionary.

With regard to the question of"fair share" and "region" the court recognized that each town would have to be considered in order to determine whether or not the regional needs were met. The court in Oakwood recognized that numerical housing goals do not necessarily lead to production of housing as zoned:

> "However, we deem it well to establish at the outset that we do not regard it as mandatory for developing municipalities whose ordinances are challenged as exclusionary to devise specific formulae for estimating their precise fair share of the lower income housing needs of a specifically demarcated region. Nor do we conceive it as necessary for a trial court to make findings of that nature in a contested case." (pages 14-15 of opinion)

The court further noted that it would be desirable for administrative agencies acting under legislative authorization to assume the regulation of the housing distribution problem. (Trial opinion page 16). See "A Statewide Housing Allocation Plan for New Jersey, November 1976." (DEBa402).

While the Oakwood court stated that it adhered to the broad principle of Mount Laurel it stated clearly as follows:

> "We intend that our judgment herein shall subserve that principle notwithstanding that we do not propose to, nor require that the trial court shall demarcate specific boundaries for a pertinent region or fix a specific unit goal as defendants' fair share of such housing needs." (page 54 of opinion)

In the only reference to the Urban League of Greater New Brunswick case, the Supreme Court stated:

> "The correlative disadvantages of a court adjudicating an individual dispute are obvious." (page 65 of opinion)

The court further noted that the formulation of a plan for the fixing of a fair share of regional needs for lower income housing, although clearly envished in Mount Laurel, involves "highly controversial economic, sociological and policy questions of innate difficulty and complexity." (page 66 of opinion).

The court has clearly stated its retreat from Mount Laurel. It in effect appears to advise trial courts not to become super planning boards. The court stated that the process was "more appropriately a legislative and administrative function rather than a judicial function to be exercised in the disposition of isolated cases." (pages 67 -68 of the opinion.)

The court further noted that it would not generally "be serviceable to employ a formulaic approach to determination of a particular municipality's fair share." (page 75 of the opinion).

East Brunswick submitted a fair share plan. The plaintiffs, through Ernest Erber submitted another one. Judge Furman imposed still a third one. The guideline should have been as stated by the Oakwood court:

> "If the existing municipal proportions correspond at least roughly with the proportions of the appropriate region the formula would appear prima facie fair."

It is submitted that the court has shifted the burden on fair share plans from the defendant to the plaintiff once the defendant has submitted a fair share plan. No serious objection

was made by the plaintiffs to the Master Plan and the table submitted by East Brunswick.[1] While Judge Furman may not have made a mistake in determining the region of which East Brunswick was a part, it appears that he erred in refusing to accept East Brunswick's zone plan.

As to the third question set forth above, the proper judicial remedy should have been for the court to have accepted East Brunswick's fair share plan and to have encouraged the implementatin of ordinances in which fifty (50%) per cent of the previously zoned industrial land would be rezoned, in which one-half acre residential zoning would be converted to planned unit residential zoning and in which a serious bona fide effort was being made by the Township of East Brunswick to address the problem of providing least cost housing for a broad segment of the population.

In effect, Judge Furman substituted his judgment for that of the East Brunswick Planning Board, the East Brunswick governing body and the Middlesex County Planning Board. The latter reviewed the East Brunswick Master Plan and found that it offered a "realistic and forthright response to the variety of needs of the residents of the township and of the larger region." (DEBa369). The County Planning Board also complimented East Brunswick for coming to grips with the very real problem of providing adequate variety and choice in housing for present and future residents. (DEBa370). The County Planning Board also approved of East Brunswick's reduction of land for

1. DEBa239.
Note that counsel for the Plaintiff encourages East Brunswick to pass ordinances implementing the Master Plan. (DEBa241)

industrial growth. (Ibid.) None of this, however, was enough to satisfy the trial court.

In Robinson v. Cahill, 62 N.J. 473 (1973)(Robinson I), the Supreme Court held that the system of school finance violated the State Constitution. However, it chose to postpone an imposition of a remedial order until January 1, 1975 in order to give the Legislature a reasonable period within which to satisfy the constitutional mandate. (Robinson v. Cahill, 63 N.J. 196 (1973)(Robinson II). In Robinson v. Cahill, 67 N.J. 333 (1975 Robinson III) the court noted that it had "more than once stayed our hand, with the appropriate respect for the province of other branches of government". 67 N.J. 333 at page 340. In view of the fact that the Legislature had failed to meet the court's timetable, the court decided to act. Id. 342. Even at the time of Robinson III the court was willing to order only a provisional remedy and to leave the final remedy in the hands of the political branches of government so long as possible. The court said:

> "We continue to be hesitant in our intrusion into the legislative process, forced only to do so so far as demonstrably required to meet the constitutional exigency." Id. 344... Courts customarily forebear the specification of legislative detail, as distinguished from their obligation to judge the constitutionality thereof, until after promulgation by the appropriate authority." Id. 344

POINT III

THE COURT EXCEEDED ITS AUTHORITY BY MAKING A SPECIFIC ALLOCATION OF LOW AND MODERATE INCOME UNITS

While Judge Furman avowedly followed the Supreme Court majority opinion in the Mt. Laurel case, in fact he appears to have followed the concurring opinion of Justice Pashman and the Trial Court opinion of Judge Martino. This may account for his having gone beyond the majority opinion in Mt. Laurel. In the case of Oakwood at Madison v. Township of Madison, N.J. (1977), again Justice Pashman urged the course of action, which was rejected by his colleagues in the Supreme Court, but which appears to have been followed by Judge Furman. Even more recently, Justice Pashman was a lone voice in the wilderness calling for more affirmative action while his brethren acknowledged the limitations of the judicial system and attempted to get the courts out of the thicket into which they had fallen. Pascack Associates, Ltd. v. Mayor and Council of Twp. of Washington, N.J. (1977). Fobe Associates v. Mayor and Council and Board of Adjustment of Demarest, N.J. (1977)

The Trial court adopted a fair share allocation formula based solely upon income. He then ordered each of eleven municipalities to produce an exact number of low and moderate income housing units by 1985. The method by which the municipalities were to carry out this order raises more questions than answers. Were they to rezone a specific number of acres or could the number of acres be flexible in order to accommodate

the specific number of units? Was the first level allocation to correct imbalance to be accomplished in the same manner as the second arbitrary allocation of 1,333 units per municipality. Why were eight of the municipalities with significantly less acreage treated differently from Monroe, Old Bridge and South Brunswick? (trial opinion pages 33-34)

The only guidance in the opinion appears at pages 33 and 34 as follows:

> "After the allocation to correct imbalance, Cranbury, East Brunswick, Edison, North Brunswick, Piscataway, Plainsboro, Sayreville and South Plainfield are ordered to rezone their respective net vacant acreage suitable for housing, as shown in the fourth table Supra., 15% for low income and 19% for moderate income on the basis of 100% zoning for housing (which this judgment does not require). The housing units thus afforded should approximate the allocation of 1,333 units each."

In addition to requiring a specific number of units it appears that Judge Furman required mandatory minimums of low and moderate income units for multi-family projects (page 34). It also appears that he required the eleven municipalities, including East Brunswick, whose ordinances were invalid, to apply for available Federal and State Subsidy programs for new housing and rehabilitation of substandard housing.

Judge Furman further stated that density incentives may be set. He understood the concept of judicial restraint only in prohibiting him from ordering the "expenditure of municipal funds or the allowance of tax abatements." (trial opinion, page 35)

In the Trial Court in the Mt. Laurel case, Judge Martino directed the defendant municipality to undertake a study to

identify the existing substandard units in the Township and the number of individuals and families, both by income and by family size, who would be displaced by an effective enforcement of local building and housing codes. He additionally required the municipality to determine housing needs for low and moderate income families who (1) resided in the Township; or (2) were presently employed by the municipality or in commercial and industrial facilities in the municipality; and (3) to determine the development of commerce and industry in the municipality and estimate the number of new low and moderate income units which would be needed to accommodate economic growth. The Supreme Court felt constrained to overrule the Trial Court's order as to the study on the grounds that it was premature.

Judge Martino further ordered Mt. Laurel to develop a plan of implementation based on its study of low and moderate income housing needs in the community. Furthermore, the Township was ordered to develop an affirmative action program "To enable and encourage 'the satisfaction of these needs." South Burlington County NAACP v. Township of Mt. Laurel, 119 N.J. Super. (Law Div. 1972) at page 179.

The Supreme Court in Mt. Laurel vacated the affirmative action portion of the Trial Court's opinion, but apparently Judge Furman hedged on this issue by using the word "should" in describing the municipal obligatin.

The majority on the Supreme Court in Mt. Laurel simply required the municipality to amend only those portions of its

zoning ordinance which the court specifically found had an exclusionary effect. The court did not specify with particularity the new laws which must be enacted, but properly left that to the Legislative discretion of the Township Council.

Justice Pashman, on the other hand, suggested in Mt. Laurel that the Trial Court ought to proceed as follows:

> "(1) Identify the relevant region; (2) determine the present and future housing needs of the region; (3) allocate the needs among the various municipalities in the region; (4) shape a suitable remedial order.. Mt. Laurel, Supra., 67 N.J. 151 at pages 215 and 216) Pashman, J. concurring)

This appears to be the exact course of action followed by Judge Furman.

1. He identified Middlesex County as the relevant region notwithstanding his reluctance to do so in the trial of Oakwood at Madison v. Madison Township (142 N.J. Super. 11, at pages 21 and 22)

2. Judge Furman determined the need of future low and moderate income housing units in the County as 18,697 units (Id. pages 36-37)

3. Judge Furman allocated these needs among the eleven municipalities whose ordinances were invalidated, first by imposing a formula which putatively equalized the number of low and moderate income families with the County average and then by arbitrarily allocating 1,333 new low and moderate income units on each of the municipalities (Id. 36-37)

4. Judge Furman created a "suitable remedial order" by

retaining jurisdiction and by ordering each municipality to perpetuate the County averages for low and moderate income people.

The Trial Court appears to have confused unmet housing needs with new rather than rehabilitated, housing units. Plaintiffs' witness, Ernest Erber claimed that 75,000 housing units were needed in Middlesex County by 1980 (T 3/22/76, p. 153 - 23 to 154 -2). He conceded that only 20,000 new units would be required by 1980. (Ibid. p. 154-8)

County Planner, Douglas Powell testified that the total need for new housing units by the year 1978 was between 10,000/ 11,000, approximately half of which were required in New Brunswick, Perth Amboy, Edison, and Sayreville and Woodbridge, (T. 3/18/76 p.41 - 9 to p. 48 - 8)

Judge Furman apparently was concerned that new zoning alone would not create the new units. This may account for his apparent directive requiring municipalities to take affirmative action. It is interesting to note that plaintiffs' witness, Ernest Erber, after having presented this plan, testified:

> "Q. Can this plan be implemented through rezoning? A. No....Zoning would provide the envelope, but it would require certain affirmative action as to the content in the terms of the kinds of housing that was built to be sure that it would be available to those of low and moderate income.
>
> Q. Can you explain your use of the word envelope? A. Well, you can rezone to make housing construction possible under certain regulations. But the simple act of rezoning would not in and of itself result in

> housing at a cost or price factor that would make it within the means of low and moderate income persons. It could result in housing that they could not afford." (T.3/22/76, P.95-8 to 95-20).

Oakwood stands for the Doctrine of Judicial restraint. The court below stands for the Doctrine of Judicial activism and expansion.

The proper remedy is set forth on the last page of the Oakwood opinion.

> "The trial court shall have discretion in the event of undue delay in compliance with this opinion or of a finding by the court that any zoning revisions submitted by defendant fails to comply with this opinion, to appoint an impartial zoning and planning expert or experts." (page 97 of the opinion).

The trial court tried to compress the time sequence of finding an exclusionary zoning ordinance, permitting the municipality to submit its own fair share plan, permitting the municipality to implement that plan with ordinances, and enabling the court to analyze the implemented ordinances with the assistance of a planner. Instead of a period of months, as would be necessary under the Oakwood ruling, Judge Furman did it all in one fell swoop. He gave the defendant municipalities 90 days to accomplish a complete change in zoning and he retained jurisdiction.

In his relatively brief opinion, Justice Mountain in Oakwood dramatically lays out the issues:

1. The solutions of the problems will be devised more

effectively by the legislature than by the courts.

2. It is impossible to come up with definitions of "fair share" or "region".

3. The municipalities must decide their fair share in the first instance.

4. Courts are not equipped for the task.

5. A court cannot rely upon its own experts.

6. There are political considerations and competing interests which must be considered.

7. Some municipalities can provide housing more readily than others.

8. The majority opinion fails to honor the tradition of home rule.

East Brunswick could live with Justice Mountain's opinion.

Similarly, Justice Schreiber in the Oakwood case noted that not every municipality is required to provide for all types of housing. See Fanale v. Hasbrouck Heights, 26 N.J. 320 (1958); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

Justice Schreiber was also aware of the Federal standard, which requires the plaintiff to establish a racially discriminatory motive in refusing to rezone for low and moderate income tenants. See Arlington Heights v. Metropolitan Housing Development Corp., 45 U.S. Law Week 4073 (January 11, 1977). East Brunswick could also live with Justice Schreiber's thinking on a remand, which would "permit the municipality to

present evidence to justify the extent to which its ordinance now permits construction of low and moderate income housing to meet the criteria set forth herein or to revise its ordinance in accordance with the minimum requirements" projected in the majority opinion. (page 7 of concurring opinion of Justice Schreiber)

Justice Pashman repeated in Oakwood what he had said basically in Mount Laurel. He looked for "powerful judicial antidotes...to eradicate the evils of exclusionary zoning." (pages 2 and 3 of opinion).

The remedial order in the Urban League case is strikingly similar to that suggested by Mr. Justice Pashman in his dissenting opinion. Justice Pashman suggested five basic remedial objectives:

1. The court should enjoin the operation of an exclusionary ordinance.

2. The trial court must enjoin all prospective abuse of the zoning power.

3. Judicial decrees must strive to preserve the amenities which have made the Defendant municipality an attractive place in which to live.

4. So far as practical, the relief granted should respect the principle of local prerogatives and land use planning.

5. The relief ordered by the trial court must be judicially manageable.

In a section entitled "Procedural approach", Justice

Pashman again sets forth the remedy followed by the trial court in the Urban League case, and by the trial court in Mount Laurel. He sets forth four steps that the court should follow:

1. Identifying the relevant region;

2. Determining the present and future housing needs of the region;

3. Allocating these needs among the various municipalities in the region;

4. Shaping a suitable remedial order.

This, of course, is the process that Judge Furman followed in the Urban League case.

Justice Pashman proposed that when a judgment is entered against the defendant municipality, all of the other municipalities in the region be joined. Id. 39. After they were joined, they would be obligated to make a fair share housing study of their own. Id. 39.

Judge Furman went beyond Justice Pashman's suggestion because he did not allow, in the first instance, the municipalities to present a plan for fair share allocations. Justice Pashman proposed a hearing at which all sides could present their views. If the plan submitted by the municipalities were unacceptable, the court would then appoint its own experts.

The key point to extract from Justice Pashman's eloquent dissent is his recognition that the initial responsibility for formulating the remedial plan remains in the hands of municipal officials in order to assure maximum respect for

local prerogatives. Unfortunately Judge Furman simply did not understand the necessity for political acceptance.

After the court had taken great pains to explain its position in Oakwood, one would have thought that the next opinion involving the definition of developed municipalities would be handled in one paragraph. This was not the case in Pascack Association, Limited v. Mayor and Council of the Township of Washington and Fobe Associates v. Mayor and Council and the Board of Adjustment of the Borough of Demarest (March 23, 1977). The zoning analysts agreed with Justice Pashman that these cases effectively "neutralize" the courts holding in Mount Laurel. (DEBa424.)

The Supreme Court in Washington and Demarest appeared to come back to the main stream of zoning law and took many pages of analysis to clarify and refine Mount Laurel and Oakwood. The majority tended to rely upon the old standard zoning cases. For example, they cited Bow & Arrow Manor v. Town of West Orange, 63 N.J. 335 (1973) as follows:

> "It is fundamental that zoning is a municipal legislative function, beyond the purview of interference by the courts unless an ordinance is seen in whole or in application to any particular property to be clearly arbitrary, capricious or unreasonable, or plainly contrary to fundamental principles of zoning or the statute." (page 13 of the opinion)

The court in Washington also cited Kozesnik v. Montgomery Township, 24 N.J. 154 (1957), Vickers v. Township Committee of Gloucester Township, 37 N.J. 232 (1962), Fanale v. Hasbrouck

Heights, 26 N.J. 320, Duffcon Concrete Products, Inc. v. Borough of Cresskill, 1 N.J. 509, (1949) and Pierro v. Baxendale, 20 N.J. 17 (1955). All of the foregoing cases stand for the proposition, subject to variation, that not every municipality must have every type of zoning use. This was a point not followed by the trial court in the pending litigation.

In Washington the majority went out of its way to state that there had been no fundamental change in the statutory and constitutional policy of New Jersey to vest local zoning policy in local legislative officials. (page 17 of the opinion). A summary of Washington Township may be stated as follows:

> "But the overriding point we make is that it is not for the courts to substitute their conception of what the public welfare requires by way of zoning for the views of those in whom the Legislature and the local electorate have vested that responsibility." (page 19 of the opinion)

The majority in Washington stated that they went as far as comports with the limitations of the judicial function in Mount Laurel and Oakwood. (page 23 of the opinion). They repeated what was stated at length in Oakwood: The problem is not an appropriate subject of judicial superintendence. (page 24 of the opinion).

Justice Schreiber in his concurring opinion goes to intent and motives similar to the Federal cases. He could find no such invidious motive and it is submitted that neither could the plaintiffs below.

Justice Pashman's dissenting opinion in Washington could

almost be a brief for East Brunswick and other developing municipalities, although it obviously would not have been so intended. He cited the pending Urban League case for the proposition that Middlesex County was part of the New York Metropolitan region. If the logic of the majority were extended to its logical extreme, most of northeastern New Jersey might be considered developed. If so, then East Brunswick would not be subjected to any judicial interference.

Justice Pashman's dissent in Washington would also put in question the conditional dismissal of the 11 towns in the Urban League case which were substantially developed even though they had some developable area. Justice Pashman's dissent also stands for the proposition that New Brunswick and Perth Amboy should not have been dismissed from the Urban League case and that they should be required to absorb a substantial number of low and moderate income housing units based upon their developed status. He conceded that the majority had made "an equitable distribution of the burdens of providing for low and moderate family housing impossible". (page 31 of the opinion).

Fobe, decided on the same day as Pascack, was treated more as a variance case than a Mount Laurel type case. The court relied upon Segal Const. Co. v. Zoning Board of Adjustment of Wenonah, 134 N.J. Super. 421 (App. Div.) Cert. den. 68 N.J. 496 (1975) and Nigito v. Borough of Closter, 142 N.J. Super. 1 (App. Div. 1976). Its significance lies in Justice Pashman's dissent. He repeats the premise that decisions of

governmental officials primarily entrusted with the planning power are presumptively valid and will be overturned only by an affirmative showing that they are arbitrary, capricious or unreasonable. (page 4 of the opinion). He underlines the decision of the majority ascribing a regional purpose for the role of"bedroom communities" in providing "a desired environment for those whose industrial, commercial and professional activities elsewhere have benefitted the social order."

East Brunswick can justly claim that it serves as a regional shopping hub for the County, that its active and passive recreational facilities fill a regional need, that it provides acquifer recharge areas which protect a regional sub-surface water supply and that it provides a solid middle income enclave to serve those who work both within and outside the region.

By way of conclusion, Judge Furman exceeded the bounds of Mount Laurel at the time the opinion was decided. He chose to follow Justice Pashman's dissenting opinion and invoked judicial activism when the majority in Mount Laurel thought otherwise. If there were any question as to the correctness of his action in 1976, there can be no question in 1977 now that the New Jersey Supreme Court has decided Oakwood, Washington and Demarest.

POINT IV

THE DOCUMENTARY EVIDENCE INDICATES THAT EAST BRUNSWICK WILL CONTINUE TO SERVE AS A RESIDENTIAL COMMUNITY FOR THE REGION WITH RELATIVELY LOW DENSITIES.

It is difficult to cull from the thousands of pages of documentary testimony in order to bring some order out of chaos. A fair case can be made, however, for the proposition that East Brunswick has experienced a dramatic rise in population from 1940 to 1970 and a subsequent slowing down during the recessionary period of the 1970's. All of the alleged exclusionary features of the zoning ordinance existed during the latter part of the 1960's and up until the present time. To the extent that the growth continued during this period, it can be assumed that East Brunswick filled a regional need for quality single family residential development.

Judge Furman noted in his opinion that: "Only East Brunswick may be characterized as an elite community." (page 16) While many residents of the Township would question that characterization, plaintiffs' documents in evidence indicate that East Brunswick apparently has many attributes of relative wealth.

In P.50A, Selected Population and Housing Statistics for Middlesex County, 1970 Census, prepared by the Middlesex County Planning Board, page 38 indicates that the 1970 census figures

place East Brunswick at the highest median income in the County. East Brunswick's median income figure was $14,845.00 while the County median was $11,981.00.[1] Page 33 of the same document indicates that East Brunswick has the highest average monthly rental in the County of $166.00 while the County average is $128.00 per month.[2] In spite of the statistics, East Brunswick's population has increased from 3,706 in 1940 to 34,166 in 1970 (Ibid. page 15)[3] The Master Plan which was adopted by the East Brunswick Planning Board after the trial had been completed, indicates that the 1975 population of the Township was 41,500 (East Brunswick Master Plan, Table 2 following page 27)[4]

P.50A indicates that East Brunswick had 9095 total housing units of which 1,187 were two or more unit structure, 32 were occupied mobile homes and 24 were vacant seasonal and migratory housing units.[5] The above figures might indicate that East Brunswick is not exactly an elite community but it is a diverse community with a predominance of middle class, single family residential neighborhoods.

Plaintiffs' exhibits further indicated the environmental constraints which limit development of East Brunswick. The long range comprehensive plan alternative of the Middlesex County Planning Board Comprehensive Master Plan, Volume 21 (p.49) sets forth the major natural resources on a chart opposite page 11.[6] Major aquifers and highly productive soils run through East Brunswick. The chart opposite page 19 entitled: "Conceptual Land Use Pattern" sets forth regional centers and

1. DEBa97 and 120
2. DEBa96
3. DEBa94
4. DEBa284
5. DEBa95
6. DEBa90

community centers. Most of East Brunswick is shown as a low density area with some growth and community areas along Highway 18. (DEBa91)

In terms of projected employment by the year 2000, seven municipalities are expected to have more jobs and three a comparable number of jobs (Table A, Appendix A[1] following page 80, p.49) Nevertheless Judge Furman made no reference to jobs in determining the number of low and moderate income housing units. He simply looked at relative wealth. Under that formula East Brunswick was destined to bear an unfair burden of the regional housing needs.

P.43, Chapter 9 of the Middlesex County Planning Board Comprehensive Master Plan, entitled "Land Use Inventory and Analysis", indicates that East Brunswick is a place where people live more than it is a place where people work. Page 32 of the exhibit indicates that East Brunswick is just one of many municipalities in the central region providing manufacturing jobs and is certainly not one of the leaders.[2] Table 6 of the document indicates that East Brunswick is certainly not a leader in wholesaling and warehousing.[3]

East Brunswick's jobs appear in the retail area,[4] (Table7) as well as in finance insurance and real estate.[5] (See Table 8) The court also reviewed Exhibit P-104 prepared by the State of New Jersey, Department of Community Affairs referred to as a developable land survey-Middlesex County Worksheet. The exhibit indicates that eight municipalities had more developable

1. DEBa92
2. DEBa84
3. DEBa85
4. DEBa86
5. DEBa87

land zoned for industrial use than did East Brunswick. Even assuming that some of these municipalities were more likely to generate industrial jobs, the court apparently did not take this into consideration in assigning dwelling units for low and moderate income housing.

The court also permitted into evidence P-105 which was prepared by Alan Mallach in February 1976 while the trial was proceeding.[1] This document refers to figures going back to 1967. It fails to take into account any growth since that time. It purports to show that East Brunswick is overzoned industrially by 253.8%. It is clear that Judge Furman relied very heavily on P-105. On page 18 of his opinin he adopts without critical comment an abstract of P-105 to the extent that it applies to the eleven municipalities whose ordinances he ultimately held invalid. He failed to consider existing industrial acreage as of the date of the trial, but simply assumed on page 21 of his opinion as follows:

> "The Township is overzoned for industry by over 1,100 acres and over 250% of projected demand."

East Brunswick had produced evidence from Gerald Lenaz, quoting from "Preface to Planning", page 7, that East Brunswick had absorbed an average of 46 acres per year.[2] This would indicate that an additional 504 acres should have been considered by Judge Furman to have been in industrial use as of the date of the hearing. It would also call into question the projected industrial uses which would be needed by the year 2000.

1. DEBa121
2. 3/16/76, T18-17 to 19-24

Perhaps it was simpler for the Trial Court to simply rely upon P-105 as fact.

Had Judge Furman relied upon P-38, "An Analysis of Low- and Moderate - Income Housing Need in New Jersey," perhaps East Brunswick would not have come out with an unfair share of the regional need. Page 21 of that document indicates that the total unmet housing need for Middlesex County was 29,507, of which East Brunswick needed 745.[1] This placed the Township eleventh in the County in terms of its own population. Nevertheless it wound up first in terms of the obligation it had to carry.

In coming up with his final formula, Judge Furman relied primarily on one document. This was P-28, Tri-State Regional Planning Commission, page 6.[2] It purported to show the income of families in each municipality by quintiles. The court attempted to equate the County average with the requirement for each and every municipality in the County. If 15% of a County consisted of low income people and 19% consisted of moderate income people, the Trial Court concluded that these would be the binding percentages for now and evermore. On page 31 of the opinion, the Trial Judge comes up with the total need in the County by 1985 as 18,697 units. Nowhere in the documentary or verbal evidence does this number appear. Nowhere does the court even attempt to explain arithmetically the derivation of this number. We all are simply expected to take it on faith. The court then apparently determines percentages

1. DEBa82
2. DEBa71-72

of low and moderate income persons in each municipality from P-28 and makes adjustments on page 32 of the opinion to bring each municipality up to County average. After having relied so completely upon planning as to be able to project the exact number of units which are required by each municipality at the present time, the court then throws planning to the winds in what might best be described as the most memorable passage in the Trial Court's opinion.

> "Subtracting 4,030 from the 18,697 low and moderate income housing units needed in the county to 1985, the balance is 14,667 or approximately 1,333 per municipality. There is no basis not to apportion these units equally." (page 32)

The Trial court noted that East Brunswick was "overzoned for industry", but plaintiff's own exhibits prepared by the New Jersey Department of Community Affairs indicate that overzoning for industry does not result in a reduction in the availability of land for residential development. (DEBa73-77). The 1970 Census figures indicate that East Brunswick has a diversity of housing types. (DEBa70). The enactment of a major planned unit residential development ordinance, affecting approximately 600 acres in the heart of town, will assure that a wide choice and variety of housing will continue to remain available for those who wish to locate in East Brunswick.

POINT V

EAST BRUNSWICK IS PRESENTLY MEETING ITS AFFIRMATIVE OBLIGATION TO PROVIDE LOW AND MODERATE INCOME HOUSING.

East Brunswick is one of the twenty communities which joined together on the Community Development Revenue Sharing Urban County Application. (The five who did not were New Brunswick, Perth Amboy, Sayreville, Woodbridge and Edison). Nora Gonzalez of the Middlesex County Planning Board testified that East Brunswick had filed a Housing Assistance Plan in order to determine the needs of lower income households. She stated that the total housing assistance needs in East Brunswick through the 1978-1980 period was One Thousand Six Hundred Eighteen, including 850 families presently residing in East Brunswick and 768 additional families expected to reside in the community.(3/15/76, T138-4 to 140-2; See P-53, DEBa99)

The Housing Assistance Plan further showed that there were 244 substandard units in East Brunswick of which 214 were suitable for rehabilitation. (DEBa115)

Shelley Waxman, East Brunswick Community Development Coordinator, testified that the Township's major effort in housing is in the area of rehabilitation of existing units. (3/16/76T30-4 to 31-16)The Township Code Enforcement Program is the principal component of this effort. The Program, funded by HUD at $60,000 for each of the three Program years (1975-1976, 1976-1977 and 1977-1978), is the Metropolitan

Entitlement amount. This includes salaries for code enforcement officer, community development coordinator, secretary, computer programer (part) and computer time and equipment. She indicated that the Program is designed to bring substandard units up to code standards and provide in those areas public services and facilities such as street trees and lights, road improvements, open space development, and improvement of neighborhood facilities. (3/16/76T35-12). The Township has a three-year rehabilitation goal to assist 91 rental units and 203 homeowner units.

Ms. Waxman indicated that the Township effort would be assisted by the CDRS Urban County allocation with distribution as follows: (Ibid.T34-11 to 25).

1975-76	$7,000	Low-cost rehabilitation loan fund
1976-77	10,000	Supplement to loan fund
	74,000	Rehabilitation-neighborhood improvement
1977-78	34,000	Open Space Development-Public Improvement in code areas

In addition, East Brunswick is expected to receive $17,000 of the $200,000 under the Urban County application for a housing rehabilitation program during 1976-77. (Ibid. T 35-1).

In addition, the Township has participated in the New Jersey Department of Community Affairs Section VIII Program for handicapped in existing units. She indicated that the Township is attempting to obtain fourteen such units for the elderly and

handicapped in rental units for families of low income.

In addition, East Brunswick is cooperating with the Middlesex County Economic Opportunities Council's program for winterization. The MCEOC provides materials and labor for minor repair to homes in need of new insulation, storm windows and the like. Two houses are being completed at this time. In its HUD application, East Brunswick set a three-year goal of one hundred assisted new, rental units. Techniques to accomplish this would include incentives to builders and private sponsors which are being considered in the proposed new Master Plan (see below).

The Court's attention is directed to Exhibit P-53, the Urban County application. In filing this application, East Brunswick agreed to cooperate with the County in order to obtain publicly assisted housing. Page 7 of the Agreement with the County obligates East Brunswick to identify the general location of lower income housing, to survey the housing, to establish housing assistance needs and goals. As the Agreement states:

> "Each municipality decided to take a regional approach in place on an independent approach for the coordination of larger community development investments, increased housing opportunities and related jobs through the County's urban area...Aggregate housing needs for the Urban County area are in keeping with the County's Adopted Interim Master Plan." (pages 4 and 5) (DEBa99).

In addition, East Brunswick currently has cooperated with a developer who proposes 129 units of senior citizen housing in the heart of the township. While there is no legal authority

to order a municipality to participate in State and Federal funding programs, East Brunswick has done so because it recognizes its needs in this area. (DEB428-436).

To the extent that the trial court's opinion directs East Brunswick to do more than it presently is, it is submitted that there is no foundation in law or equity for such an opinion.

POINT VI

COUNTY POPULATION PROJECTIONS RELIED UPON BY THE TRIAL COURT WERE OBSOLETE AND INFLATED.

Judge Furman appeared to rely heavily upon County Planning Board projections which were derived from 1970 studies and reports, the data for which was accumulated as far back as 1967. At that time the County was bullish in its predictions for growth. The projections were made at a time when growth had not yet become a dirty word. Accordingly the Middlesex County Interim Master Plan, Volume 20 of the Comprehensive Master Plan (P40) shows on Table E-1 that East Brunswick's population by the year 2000 would be 81,668 and that the County population would be 1,385,389. (DEBa80).

In January 1976 the County made more realistic projections as shown in DEB 5 in evidence which reduced the County Projections from the previous figure to approximately 937,000 people.[1] The recent projections would comply with the East Brunswick Comprehensive Master Plan projections of a population by 1980 of approximately 50,000 people (East Brunswick Master Plan page 20)[2] and a long range population projection of 60,600 people. (DEBa284).

1. DEBa122-135
2. DEBa275

POINT VII

EAST BRUNSWICK SATISFACTORILY ANSWERED PLAINTIFFS' CHARGES OF EXCLUSIONARY ZONING.

Plaintiffs, through Alan Mallach, put in evidence P-111, summary of zoning ordinance provisions for East Brunswick. Mr. Malbch objected to the minimum lot size, the minimum frontage, minimum floor area in all of the single-family residential zones. In the garden apartments zone he objected to the minimum site of four acres, the maximum density of 12 dwelling units per acre, the requirement that there be no more than twenty (20%) per cent of lot coverage, that the basement area equal thirty-five (35%) per cent of the first floor, that there be two parking spaces for each two bedroom dwelling unit and 1.5 parking spaces for each one bedroom dwelling unit, that air-conditioning be provided in garden apartments, and that there be 1,000 square feet of recreation area for each ten dwelling units. He noted that the median income for a family of four based upon the 1970 census, was $14,855.00, the highest in the County.

Gerald Lenaz, testifying in opposition to Mr. Mallach, noted that notwithstanding the zoning, there were approximately 1,303 single family homes on lots having frontage of eighty feet or less. (3/16/76T20-16). He also referred to the fact that 3,203 single family homes in East Brunswick had an assessment of less than $35,000 and 5,838 had an assessment in excess of $35,000. (3/15/76,T15-9). This constituted 35.4% of the 1970

housing stock.

Mr. Lenaz pointed out that although the zoning ordinance prohibits mobile homes, a mobile home park exists in the Township. (DEBal63). He further noted that the Township has repealed the portion of its ordinance which attempts to establish a bedroom ratio in the multi-family zone. (3/16/76,T4-10-20)With regard to over-zoning for commercial uses, Mr. Lenaz noted that there are approximately 103 vacant potentially developable acres so zoned. (3/16/76,T19-1) .This would represent about four acres per year over the next 25 years which is the ultimate growth period projected for the Township. Considering past trends of commercial development coupled with potential increased demand in office and service establishments, Mr. Lenaz felt that the amount of commercial land was not excessive. (3/16/76,T18-21 to 19-24).

Mr. Lenaz noted that East Brunswick is an upper-middle income community and a broad range of lot widths is desirable in order to encourage housing not only for those of low and moderate income but also for those of middle and upper income. (3/16/76,T21-16).

With regard to the minimum floor area requirements, which in East Brunswick range between 1,250 and 1,500 square feet Mr. Lenaz cited Exhibit P-37 entitled "Land Use Regulation. The Residential Land Supply" Department of Community Affairs, April 1972. Page 19 of this Exhibit provides a standard recommending 1,150 square feet for a family of four, 1,400

square feet for a family of five and 1,550 square feet for a family of six. The document reads as follows:

> "In short, minimum dwelling size should be related to the intended occupants of the dwelling which, although much more difficult to administer locally, would be significantly more equitable. (page 19) (DEBa76,78).

Since Mr. Lenaz indicated that East Brunswick was a commuter community of young families with several children, it would appear that the minimum square footage requirements in East Brunswick's ordinance were reasonable. On page 26 of Exhibit P-37 it is noted that the cumulative impact of lot size, frontage and building size requirements was not found to be appreciably more prohibitive of low and moderate cost housing than the impact of each requirement taken alone.

With regard to the multi-family zone, Mr. Lenaz felt that the density range of 12 dwelling units per acre and twenty (20%) per cent building coverage was reasonable. (3/16/76,T10-10 to 11-12) He noted that the ordinance concerning thirty-five (35%) per cent of first floor area was not mandatory, but only "where topographical conditions permit". With regard to the number of parking spaces, both Mr. Lenaz, and Carl Hintz, East Brunswick Township Planner, stated that the present standards were in fact low. Each would have preferred to provide 2.25 or 2.5 parking spaces for units having in excess of two bedrooms. This would be especially true in view of the fact that there are no longer any bedroom restrictions.

Both Mr. Hintz and Mr. Lenaz testified that 1,000 square

feet of recreational space for each ten dwelling units comes down to a 10 x 10 foot plot for each unit. This was considered low based upon recognized standards. (3/16/76,T6-1 and 12-25).

With regard to plaintiffs' claim that an excessive amount of land has been zoned for industry, reference is made to Exhibit P-37, the relevant parts of which read as follows:

> "The comparison reveals that although there is a phenomenon which might be termed 'overzoning' for industry, this has not been reflected in a reduction in the availability of land for residential development, but has been reflected in the provision of a smaller percentage of land for commercial development." (page 8, also see conclusion on page 25)

With regard to the claim that the four acre minimum lot area is excessive in a garden apartment zone, Mr. Lenaz testified that this area relates to the economical operation and maintenance of a multi-family project in a municipality such as East Brunswick which has some developable land remaining. (3/16/76,T19-1). Mr. Lenaz indicated that larger acreage would be preferable in order to integrate usable open space, parking, buffers and environmental concerns. (3/16/76,T14-9). The proliferation of small, multi-family sites in East Brunswick would produce other complications with regard to site access, traffic and area impact.

Finally, in answer to Mr. Mallach's testimony that arbitrary or broadly discretinary provisions such as cluster and open space zoning have a negative impact on persons of low and moderage income, the Court's attention is directed to

Exhibit #P-111. East Brunswick has cluster options in the R-1 zone which provide for minimum lots of 20,000 square feet and in the R-2 zone which provides for minimum lots of 15,000 square feet. The standards and criteria of a cluster zoning and subdivision ordinance are in evidence as plaintiffs' Exhibit P-110.

By way of conclusion on this point, it is submitted that a municipality does not have to eliminate all minimum bulk, size and density requirements in order to affirmatively afford the opportunity for low and moderate income housing. If land in East Brunswick were zoned for multi-family use and density were increased and height limitations were eliminated, you would not wind up with low and moderate income housing. The result would be to drive up the cost of land which cost would be passed on to the tenants. Luxury highrise apartments, patterned after Fort Lee, would grace Highway 18.

A final note may be in order with regard to Mr. Milach's complaint that all of the municipalities prohibit mobile home parks. The court noted several times during the course of the trial that the case of Vickers v. Township Committee of Gloucester Township, 37 N.J. 232 (1962) is still the law of the State. In that case the Supreme Court of New Jersey held that no municipality can be ordered to zone for mobile home parks.

POINT VIII

PLAINTIFFS URBAN LEAGUE, CHAMPION AND TUSKEY LACK STANDING TO INSTITUTE THE ACTION.

Mount Laurel granted standing to four classes of plaintiffs:

1. Present residents of the township residing in dilapidated or substandard housing;

2. Former residents who were forced to move elsewhere because of the absence of suitable housing;

3. Non-residents living in central city substandard housing in the region who desire to secure decent housing and accompanying advantages within their means elsewhere;

4. Three organizations representing the housing and other interests of racial minorities.

It is submitted that none of the plaintiffs in the pending litigation meet the requirements of any of the categories enunciated in Mount Laurel.

On March 2, 1976 the court granted a motion by East Brunswick to dismiss the complaint of Lydia Cruz but denied East Brunswick's motion to dismiss as plaintiff the Urban League, Judith Champion and Kenneth Tuskey. (3/2/76,T42-22 to T51-6). In view of the fact that Ms. Cruz was the sole representative of the community of low and moderate income Spanish speaking people, it is submitted that that class is no longer represented in this case.

Plaintiff, Judith A. Champion is a white welfare mother living in South River with her two children. She admitted that

she is currently not looking for new quarters. (2/3/76,T102-4). It is inconceivable that any change in the zoning practices of East Brunswick could help Ms. Champion. She does not need "affordable" housing in East Brunswick. She simply needs more money.

Similarly Mr. Tuskey does not represent a class intended to be protected by Mount Laurel. He is a Caucasian residing in Kendall Park which he described as a community of 1500 families. 60 of whom are minority. He is satisfied with his present accommodations. (2/3/76 , T169-6.) He has no connection with East Brunswick. The trial court stated that if Mr. Tuskey's complaint were acted upon, it would have application only to South Brunswick, of which Kendall Park is a part. (2/4/76, T251-22).

Plaintiff, Barbara Tippitt, admitted that her family would not qualify for assistance from the New Brunswick Housing Authority because her husband makes too much money. She was told about homes in East Brunswick but did not look there. (2/11/76,T83-15).

Plaintiff, Cleveland Benson, is black and head of an 11 member household. He stated that there were no problems with his apartment in Piscataway except that it was too crowded. (2/4/76,T298-21).

The Urban League seeks housing for its members and others, mostly black and Hispanic, throughout Middlesex County. It is submitted that the Urban League is an intermedler, an interloper

and a stranger to the law suit. Cf. Crescent Park Tenants Association v. Realty Equity Corporation of New York, 58 N.J. 98 (1971); Warth v. Seldin, 422 U.S. 490 (1975); Evans v. Hills, 537 F. 2d 571 (2nd Cir. 1975); Urban League of Essex County v. Township of Mahwah, 147 N.J. Super. 28 (App. Div. 1977).

It is submitted that the Mahwah case should be distinguished on its facts. In that case the two plaintiffs resided in New York and were employed at the Ford Motor Company Plant in Mahwah, New Jersey. The court held that they had standing to challenge the zoning ordinance of Mahwah but their holding was limited:

> "Holding as we do, that it was error to dismiss the complaint for lack of standing as to these two individual plaintiffs, it is unnecessary for us to express any opinion as to the standing of the other two individual plaintiffs or of the two organizations." 147 N.J. Super. 28 at page 35.

In addition the Appellate Division in Mahwah overturned the trial court's decision that the plaintiffs did not have standing because the trial court had adopted Federal criteria of standing based upon Article III of the U.S. Constitution. The trial court had applied the reasoning of Warth on both State and Federal issues. It is submitted that none of the plaintiffs have standing and accordingly the case should be dismissed. Parenthetically it should be indicated that New Jersey appears to be moving toward the Federal standards which recognize the competing interests of municipalities. Cf. Construction Industrial Association of Sonoma County v. City of Petaluma, 522 F. 2d 897 (9th Cir. 1975) Cert. denied. At the very

least, if the court does not dismiss the complaint in accordance with Federal standards, the remand should order the trial court to accept the fair share plan submitted by East Brunswick together with the ordinances which implement that plan.

Upon remand, the court would consider the legal validity of the zoning ordinance in effect at that time. Oakwood at Madison v. Township of Madison, 62 N.J. 185 (1972), on remand, 128 N.J. Super. 438 (Law Div. 1974).

In analyzing the viability of the East Brunswick Planned Unit Residential Development Ordinance (DEBa437-440) the court will have to determine whether East Brunswick has avoided the pitfalls of the Madison ordinance which may be summarized as follows:

1. Two of the three areas were on remote sites unserviced by water and sewer utilities.

2. If site is inadequately serviced by water, sewage or traffic facilities, maximum allowable density may be reduced.

3. Minimum acreage ranges between 150 acres and more than 500 acres.

4. There was an unreasonably high minimum of detached single family units.

5. There was an unreasonably low maximum density of units per acre.

6. All of the PUD zones required non-residential uses.

7. The developer was required to build a school

large enough to accommodate the school age children which would occupy the development and the developer was further required to dedicate land to the Township.

8. The developer was required to go through a lengthy three stage approval of process.

By comparison the East Brunswick Master Plan and ordinance, which were designed to meet Mount Laurel, provide as follows:

1. The location is central, not remote, and it is completely serviced by utilities.

2. While the location is generally served by utilities, there is no provision to reduce the maximum density should the case be otherwise.

3. Minimum acreage is 40 acres, except that Village Green Two A has a minimum acreage of only 25 acres.

4. There is no minimum number of single family detached homes.

5. There are relatively high numbers of units per acre.

6. There are no non-residential uses.

7. The developer is not required to build a school or dedicate land.

8. Application is in standard stages of preliminary and final approval.

Most significantly, the East Brunswick ordinance permits development at a higher density for the construction of dwelling units for persons of low or moderate income in the ratio of one additional unit of conventional housing for each unit of

low ormoderate income housing per acre. The developer is encouraged in the ordinance to apply for Federal, State or private subsidy programs to provide low and moderate income housing. If a developer takes advantage of the low and moderate housing incentive, he can increase his net residential density up to 20 dwelling units per acre in the development of multi-family housing.

East Brunswick has fairly met the requirements of Mount Laurel and Oakwood. It can live with those decisions. It cannot live with the trial court's decision in this case.

POINT IX

THE DEFENDANTS WERE SUBSTANTIALLY PREJUDICED BY RECEIVING LATE NOTICE OF PLAINTIFFS' EXPERTS, INADEQUATE NOTICE AS TO THEIR REPORTS AND INSUFFICIENT TIME TO TAKE THEIR DEPOSITIONS.

Although this case commenced in July 1974 and interrogatories were timely served the defendants received no notice as to some of the experts whom plaintiffs produced and late notice as to others. The first notice of any type was received in late December 1975. The trial was scheduled to commence on February 2, 1976. Depositions were taken in a hurried fashion right up to the week of the trial.

While this Point will be briefed by other co-defendants it is submitted that, to the extent the court relied upon testimony produced by plaintiffs' experts, the defendants were severely prejudiced.

CONCLUSION

For the reasons set forth above, it is submitted that the opinion of the trial court should be reversed and a ruling should be made that East Brunswick has complied with the legal requirements of the New Jersey Constitution, statutes and case law. Alternatively, the matter should be remanded to the trial court for a hearing as to the bona fide efforts undertaken by East Brunswick toward the elimination of undue cost generating requirements and the fair share allocations suggested by East Brunswick.

Respectfully submitted,

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